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In the Supreme Court of the United States

October Term, 1983

MARY ANNE ROBERTSON, *Petitioner,*

vs.

FLORIDA BOARD OF BAR EXAMINERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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34 pp

QUESTION PRESENTED

WHETHER FLORIDA'S UNLIMITED INQUIRY INTO BAR APPLICANTS' PAST PSYCHOLOGICAL CONSULTATIONS VIOLATES THEIR FEDERAL RIGHT TO PRIVACY?

PARTIES TO THE PROCEEDING

Petitioner in this case is Mary Anne Robertson.

Respondent is the Florida Board of Bar Examiners.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Florida appears at 443 So.2d 77 (Fla. 1983) and is at A. 1. The companion opinion, *Florida Board of Bar Examiners Re: Applicant*, is reported at 443 So.2d 71 (Fla. 1983) ("*Board of Bar Examiners I*") and is at A. 3-18.

JURISDICTION

The Supreme Court of Florida issued its decision November 10, 1983. Petitioner Mary Anne Robertson ("Robertson") timely filed her Motion for Rehearing pursuant to Rule 9.330(a) of the Florida Rules of Appellate Procedure, which motion was denied by the Supreme Court of Florida on February 9, 1984. (A. 2). This petition for writ of certiorari has been filed and docketed within the period established by Supreme Court Rule 29.1. The Court has jurisdiction to review the judgment of the Supreme Court of Florida under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise there-

of; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 23 of the Florida Constitution provides:

> *Right of Privacy.* Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Article V, Section 15 of the Florida Constitution provides:

> *Attorneys; admission and discipline.* The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.

Section 90.503(2) of the Florida Statutes provides:

> A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of his mental or emotional condition, including alcoholism and other drug addiction, between himself and his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.

Article III of the Florida Rules of the Supreme Court Relating to Admissions to the Bar, provides in pertinent part:

> B. CHARACTER AND FITNESS REQUIREMENTS
>
> *Section 2.* No person shall be recommended by the Florida Board of Bar Examiners to the Supreme Court of Florida for Admission to The Florida Bar unless such person first produces satisfactory evidence to the Board of good moral character and an adequate knowledge of the standards and ideals of the profession and that such person is otherwise fit to take the oath and perform the obligations and responsibilities of an attorney.
>
> * * *

Section 4. (a) Any applicant who is dissatisfied with the Board's recommendation concerning his or her character, fitness or general qualifications, may, within sixty (60) days after notice of the Board's recommendation, file with the Board a petition for reconsideration. . . .

Item 28 of the Applicant's Questionnaire and Affidavit provided by the Florida Board of Bar Examiners states:

(a) Have you ever received diagnosis of amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder? ..... If yes, please state the names and addresses of the psychologists, psychiatrists, or other medical practitioners who made such diagnosis.

(b) Have you ever received REGULAR treatment for amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder? ..... If yes, please state the names and addresses of the psychologists, psychiatrists, or other medical practitioners who treated you. (Regular treatment shall mean consultation with any such person more than two times within any 12 month period.)

I have directed each of the foregoing doctors and hospitals to furnish to the Board any information the Board may request with respect to any such treatment.

(A. 20).

The authorization and release form provided by the Florida Board of Bar Examiners states:

I, ..., having filed an application with the Florida Board of Bar Examiners and fully recognizing the responsibility to the Public, the Bench, and the Bar

of this State lodged with the Florida Board of Bar Examiners by the Supreme Court of Florida under the Constitution of the State of Florida to determine that only those of high character and ability are admitted to The Bar of Florida, hereby authorize and request every medical doctor, school official, and every other person, firm, officer, corporation, association, organization or institution having control of any documents, records or other information pertaining to me relevant to my good moral character and fitness to perform the responsibilities of an attorney, to furnish the originals or copies of any such documents, records and other information to said Board, or any of its representatives, and to permit said Board, or any of its representatives, to inspect and make copies of any such documents, records and other information including but not limited to any and all medical reports, laboratory reports, X-rays, or clinical abstracts which may have been made or prepared pursuant to, or in connection with, any examination or examinations, consultation or consultations, test or tests, evaluation or evaluations, of the undersigned.

I hereby authorize all such persons as set out above to answer any inquiries, questions, or interrogatories concerning the undersigned which may be submitted to them by the Florida Board of Bar Examiners or its authorized representative, and to appear before said Board, or its authorized representative, and to give full and complete testimony concerning the undersigned, including any information furnished by the undersigned. I hereby relinquish any and all rights to said reports, including but not limited to clinical abstracts, consultations, evaluations, or any other information incident in any way to cooperation with

the Florida Board of Bar Examiners, or its authorized representative, and fully understand that I shall not be entitled to have disclosed to me the contents of any of the foregoing.

I hereby release and exonerate every medical doctor, school official, and every other person, firm, officer, corporation, association, organization or institution which shall comply in good faith with the authorization and request made herein from any and all liability of every nature and kind growing out of or in anywise pertaining to the furnishing or inspection of such documents, records and other information or the investigation made by said Florida Board of Bar Examiners. The undersigned further waives absolutely any privilege ..he may have relevant to h..... good moral character and fitness to perform the responsibilities of an attorney under Sections 90.242 and 490.32, Florida Statutes.

(A. 8-9).

STATEMENT OF THE CASE

This case actually began more than six years ago when Mary Anne Robertson, the former Sister Charles Ellen,[1] consulted a psychiatrist several times because she was suffering from a mild depression. With the aid of this counseling, she discovered that she had reached a "transitional" phase in her life. Based upon intensely personal and highly intimate considerations, she determined to pursue a new vocation: the practice of law.

Robertson enrolled in a Florida law school and applied for admission to The Florida Bar. She did not respond to Item 28(b), a question on the Applicant's Questionnaire and Affidavit (the "Application") which on its face appeared to require both sweeping disclosure of all past "regular" consultations with any psychologist or psychiatrist and an unconditional waiver of the right to maintain the confidentiality of the substance of such consultations, irrespective of whether it would have any relevance to the applicant's fitness to practice law.[2] Rather than consent to the gratuitous disclosure of information she considered highly personal, Robertson diligently corresponded with

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1. Robertson left the convent some six years prior to the time she sought the counseling at issue here.

2. The text of the question is reproduced in full at p. 4 *supra;* the text of the waiver and release form is at pp. 4-6, *supra.* Consultations were to be disclosed if the applicant had had two within any 12 month period. The inquiry was unlimited in time or scope. For example, if an applicant had seen a child psychologist three times in one year as a young child because of "bed-wetting" such "treatment" was to be disclosed. No exceptions were created for highly intimate, but irrelevant, problems such as impotency, frigidity or general marital problems.

the Florida Board of Bar Examiners (the "Board")[3] for a period of two-and-a-half years, attempting first to have the terms of the question defined or modified, and finally, to have the question waived or omitted from the Application. Despite its acknowledgement of the legitimacy of her claim, the Board persisted throughout in refusing her requests that it address the privacy issue she raised, insisting that it would not even initiate the processing of her Application if she did not respond in full.[4] Therefore, on April 27, 1981, Robertson finally instituted an original proceeding in the Florida Supreme Court, pursuant to Article III, Section 4, Rules of the [Florida] Supreme Court Relating to Admissions to the Bar (the "Admission Rules"), seeking review of the Board's decision. Some two-and-a-half years later, on November 10, 1983, the Florida Supreme Court denied, in a one-line opinion, Robertson's petition for review. On February 9, 1984, over five years after she applied for admission to the Bar, her request for rehearing was similarly denied. Robertson now files this petition

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3. The Florida Board of Bar Examiners consists of twelve members of The Florida Bar and three lay people. The Board of Governors of The Florida Bar recommends appointees from which the Florida Supreme Court selects the attorney members of the Board. A joint committee of the Board of Governors and the Board of Bar Examiners recommends those appointees from which the Court selects the lay members of the Board.

4. One reason the Board acknowledged a serious question existed with respect to the applicant's privacy right was the recent addition of a strong right to privacy provision to the Florida Constitution, reproduced at p. 2, *supra*. In fact, the Board formed a special committee to study the matter, but ultimately stated a court decision was necessary to resolve the issue. The Board's ruling that it would not commence processing Robertson's application until she complied appears peculiarly coercive and inappropriate in this context. Because The Florida Bar characteristically requires six to eight months to conduct its character investigation, early processing is critical to applicants. As the facts recounted *infra* aptly demonstrate, the Board has conducted itself throughout with an institutional arrogance and insensitivity.

for a writ of certiorari to the Supreme Court of Florida in a final attempt to obtain the review of her cause she has yet to receive.

A. The Application Process.

On January 15, 1979, when she submitted her Application to the Board in accordance with the Admission Rules, Robertson was a law student completing her legal education at the Nova University Center for the Study of Law in Fort Lauderdale, Florida. She responded accurately and completely to all questions on the extensive Application save one. That question, Item 28(b), asks:

> Have you ever received REGULAR treatment for amnesia, or *any form of* insanity, *emotional disturbance,* nervous or mental disorder? .....
>
> Yes or no
>
> If yes, please state the names and addresses of the psychologists, psychiatrists, or other medical practitioners who treated you. (*Regular treatment shall mean consultation with any such person more than two times within any 12 month period.)*
>
> I have directed each of the foregoing doctors and hospitals to furnish to the Board any information the Board may request with respect to any such treatment.

(A. 20) (emphasis added).

While the question appears to require complete disclosure of the details of all past psychological consultations and an unconditional waiver of the psychotherapist-patient privilege, the language is somewhat abstruse; consequently, Robertson requested clarification of certain terms. She also asked for an explanation of the nature of

the inquiries the Board might make in its investigation of the information disclosed.[5] (A. 20).

By letter on February 5, 1979, the Board (i) ordered Robertson to answer Item 28(b), and (ii) informed her that:

> The Board spent many hours deliberating on what constituted treatment under the wording of Item 28(b) and finally decided to define, for the purposes of the Board's application form, regular treatment as more than two consultations with a psychologist, psychiatrist or other medical practitioner within any twelve month period.

(A. 21).

The Board neither explained the rationale behind this definition nor offered a definition of "emotional disturbance" as Robertson had requested. It did not suggest any types of psychological problems which could reasonably be excluded from inquiry. The Board did not provide any explanation of the inquiries it might conduct on the basis of the information obtained from Item 28(b)—although the Board did make it clear the information would be used to investigate the nature of any consultation. (A. 21-22).

On February 28, 1979, Robertson submitted in response an "Amendment" to her Application. There she stated that she objected to Item 28(b) because it violated her right to privacy, and declined to respond to the Item. (A. 23).

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5. Robertson did, however, answer Item 28(a), which asked only whether the Applicant had ever been *diagnosed* as having one of the "afflictions" listed in Item 28(b). (A. 20). Robertson also answered all questions on the Application relating to the use of drugs or alcohol, her moral character, and her mental competency (including Item 27 which asks whether the applicant has ever been declared legally incompetent). (A. 19-20). Robertson was never diagnosed as a depressive or as suffering from clinically-defined depression.

The Board summarily rejected the Amendment claiming "[t]he Supreme Court of Florida recently ruled in a similar situation that an applicant must file the required information under Item 28 before processing of the application by the Board could continue." (A. 24). The Board returned Robertson's Application unprocessed on March 20, 1979. (A. 25). The early initiation of the "processing" procedure is important because the Board routinely requires six to eight months to conclude its exhaustive "character and fitness" investigation of applicants, and delay in the completion of this processing can substantially impair an applicant's ability to secure employment.

Robertson requested a citation for, or access to, the referenced decision of the Supreme Court of Florida. (A. 30). The Board then informed her it had "checked the appropriate order concerning the recent Court decision [referred to in the earlier letter] . . . and [found] that the wording [did] not clearly tell [the Applicant] what [the Board had] indicated." (A. 26).[6] Robertson requested clarification of this response (A. 27), and the Board replied by ordering Robertson to either answer Item 28(b) or petition the Board, even though "the Board [had] consistently held that [Robertson] must complete the Application in its entirety." (A. 28).

On August 4, 1979, Robertson made a second request for clarification. (A. 29-31). She listed again precise questions she needed the Board to answer before she could respond to Item 28(b). (A. 31). The Board's only response was to instruct Robertson to "use [her] own best judgment" in responding to Item 28(b). (A. 32). Should

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6. Counsel has been unable to locate such case, and of course, the Florida Supreme Court made no reference to this "precedent" in its opinion in *Board of Bar Examiners I.*

she wish to petition, the Board informed her, she could at her option direct such a petition either to the Board or directly to the Florida Supreme Court.

Thus, on September 24, 1979, Robertson petitioned the Board for a waiver of the requirement that she respond to Item 28(b). (A. 33-34). She further requested that the Board consider rewording the question or omitting it from the Application altogether. The term "emotional disturbance" was ambiguous and the entire inquiry discriminatory. Moreover, the question as worded did not seem properly to further any compelling state interest. With her petition, Robertson enclosed for the Board a survey she had conducted of applications in other states which demonstrated Florida's question to be far more intrusive than that of other states[7] generally. (A. 45-49).

One month later, the Board's only response was to inform Robertson that her Application could not be processed until Item 28(b) was completed. (A. 35).

On December 12, 1980, counsel for Robertson wrote a lengthy "lawyer's letter" to the Board on her behalf requesting a review of the appropriateness of Item 28(b). (A. 36-44). The letter pointed out that Item 28(b): (i) was impermissibly vague and overbroad; (ii) as formulated served no valid or articulated state purpose; (iii) violated Robertson's statutory and common law privilege to keep confidential her psychological treatments; and (iv) violated her right to privacy under Article I, Section 23 of the Florida Constitution and under the Fourteenth Amendment of the United States Constitution. The Board made no

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7. Counsel for Robertson has recently conducted a survey of the bar applications in the fifty states and the District of Columbia. This survey is not at this time complete and for this reason is not reproduced in the Appendix. Results obtained thus far are discussed *infra* at pp. 23-25. Counsel intends to file a Supplemental Appendix containing all pertinent survey information as soon as such survey is complete.

response to any of the points raised by counsel, but the matter was again taken under consideration and referred to the Board's attorney. (A. 50).

On February 16, 1981, counsel for Robertson was informed that the Board had decided to form a "special committee to review the entire application in view of . . . concerns and considerations of the recently enacted Right to Privacy amendment to the Florida Constitution." (A. 51). The Board also informed counsel that it would nevertheless require Robertson to complete Item 28(b) before it would process her Application.

Hence, on March 12, 1981, counsel for Robertson resubmitted the Application on her behalf with the request that the Board process it, "with completion of Item 28(b) being dependent on the special committee's action." (A. 53). On April 17, 1981, counsel advised the Board of Robertson's intention to petition the Florida Supreme Court to review the Board's refusal both to amend the Application and to initiate its processing pending the special committee's action. (A. 55). To avoid unnecessary administrative delay in admission to The Florida Bar, Robertson requested that the Board process the Application pending a final decision of the Florida Supreme Court. (A. 55).

The Board subsequently entered its final ruling, again refusing to initiate processing of Robertson's Application until she completed Item 28(b). (A. 57). The Board noted that the special committee would not act in the near future, and that, in any event, the Board would require a judicial construction of the privacy right asserted before it could reach any decision. (A. 57). At no time did the Board attempt to explain the purpose of Item 28(b), or explain why it would not initiate processing of Robertson's Application until after she had answered Item 28(b).

On May 29, 1981, Robertson filed an Amendment to her Application responding to Item 28(b) because the Board refused to process her Application pending her appeal to the Florida Supreme Court. As the Board was well aware, its delay in processing her Application would have concomitantly delayed her admission to The Florida Bar and prevented her from earning a livelihood in her profession. In her Amendment, Robertson acknowledged that she had had consultations with a psychiatrist during the period prior to her decision to enter law school when she was mildly depressed, and she disclosed his name and address.

Thus, for two-and-a-half years Mary Anne Robertson conscientiously pursued her request for limitations on the intrusive scope of Item 28(b) with the Florida Board of Bar Examiners. She identified fundamental state and federal constitutional objections to the question she repeatedly refused to answer. During the entire period, the Board did no more than acknowledge the problem Robertson raised and attempt to coerce her by evasion and delay to abandon her rights.

B. The Proceedings In The Florida Supreme Court.

On April 27, 1981, Robertson petitioned the Florida Supreme Court for review of the Board's decision. She sought (i) reversal of the Board's decision that Item 28(b) need not be deleted; (ii) an order prohibiting the Board from using the privileged information she disclosed; (iii) a return of fees assessed her for "late" filing of her Application; and (iv) a declaration of her rights. She argued that Item 28(b) was impermissibly vague and overbroad. Because the question encompassed *all* past "regular" consultations, without regard to subject matter or chronological relevancy, it would gratuitously unearth very private

information not material to the Board's legitimate fitness inquiry. Item 28(b) was thus *unnecessarily* intrusive and violated both her state and federal constitutional rights to privacy.

Robertson argued that instead of adopting the "least intrusive" means and most narrowly drawn regulations for establishing fitness, as constitutionally required, the Board had adopted the *broadest* and *most intrusive* means. Its inquiry, not limited in time or scope, thus intruded into the most private aspects of her life, thereby affecting personal decisions which, constitutionally, were hers alone. She also noted that The Florida Bar made no similar disclosure demands upon practicing lawyers.

In response, the Board conceded that its right "to inquire and to investigate personal matters in an applicant's background is, of course, not unlimited." (Brief of Florida Board of Bar Examiners at 3). And the Board acknowledged at least that "a rational connection must exist between any qualification restriction on an applicant's admission and his fitness or capacity to practice law," citing this Court's opinion in *Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957). (Brief of Florida Board of Bar Examiners at 3). Consequently, the Board offered two arguments in support of Item 28(b). First, an inquiry into essentially all past psychological consultations was justified because of "the compelling state interest in assuring that persons admitted to the Bar are fit in all respects to practice law in this state." (Brief of Florida Board of Bar Examiners at 4). Since members of The Florida Bar must be fit *in all respects,* all aspects of their psychological makeup, no matter how intimate and unrelated to law, were fair game for investigation. Second, the applicant necessarily waived her psychotherapist-patient privilege when she applied for membership in the Bar and placed her

mental condition at issue. The Board made no attempt to suggest that Item 28(b) was narrowly drawn to be the least intrusive means of serving the compelling state interest in fitness, and instead argued that its duties allowed it complete and unfettered discretion to "determine what information [was] related to fitness to practice law." (Brief of Florida Board of Bar Examiners at 4).

In essence, the Board argued that, because it was the arbiter of relevance, it could ask applicants whatever it chose; it thus had the right to force even the unnecessary waiver of the psychotherapist-patient privilege. In fact, the Board argued, the waiver was automatic. All psychological consultations were "relevant." Therefore, the applicant could be considered to have put her entire psychological counseling history "in issue" and waived her privilege simply by applying for membership in The Florida Bar.

C. The Decision Of The Florida Supreme Court.

Robertson's case was pending in the Florida Supreme Court fully briefed (but never argued) for 28 months. In the interim, another case also challenging Item 28(b) arose. On November 3, 1983, the Florida Supreme Court issued a full opinion in that case, *Florida Board of Bar Examiners Re: Applicant,* 443 So.2d 71 (Fla. 1983), ("*Board of Bar Examiners I*") and, one week later, summarily decided the case of Mary Anne Robertson. In a *per curiam* order, the Florida Supreme Court denied Robertson's petition for review:

> Petition for review is denied. *Florida Board of Bar Examiners Re: Applicant,* 443 So.2d 71 (Fla. 1983).
>
> It is so ordered.

(A. 1).

Without argument and without opinion except for its citation to *Board of Bar Examiners I*, the Florida Supreme Court simply closed the file on Mary Anne Robertson. *In Board of Bar Examiners I*, the court held the Board's actions had met "even the highest standard of the compelling state interest test." 443 So.2d at 74. (A. 12). The state bore "a heavy burden of justification" but its "interest in insuring that only those fit to practice law [were] admitted to the Bar" nevertheless merited the intrusion of the challenged inquiry. *Id.*

The Florida Supreme Court reached its startling conclusion without ever considering the *possibility* that less intrusive alternatives to the all-encompassing Item 28(b) might exist. The court summarily dispensed with the idea that the inquiry could effectively be limited in time or scope. It neither considered ways in which to limit Item 28(b) to the discovery of material actually relevant to fitness, nor explored the problems raised by the breadth of the current inquiry.

In fact, the court's opinion appears but to mirror the confusion inhering in the Application and release form. Within a single paragraph, the court notes (1) that no "precise list" of relevant medical conditions is possible and (2) that the applicant need not worry because the psychological release form she signs is "limited to information *relevant*" to fitness. How the Board is able to determine relevance in the latter instance and not in the former is never considered by the court. 443 So.2d at 76. (A. 14-15).

A single Justice dissented from the court's opinion in both *Board of Bar Examiners I* and Robertson's case. He disagreed with the majority, and agreed with Robertson, on the crucial point: the existence of, and need for, less intrusive alternatives to Item 28(b). The Board's inquiry

was particularly and unnecessarily intrusive in an area that called for the greatest sensitivity. Thus, the justice suggested limiting Item 28(b) in time and scope to make it more relevant to the subject of the Board's legitimate concern: the applicant's fitness to practice law. 443 So.2d at 77. (A. 17-18).

D. The Petition For Rehearing.

On November 28, 1983, Robertson timely filed a petition for rehearing, pursuant to Rule 9.330(a), Florida Rules of Appellate Procedure. She argued that the Florida Supreme Court had misapprehended applicable constitutional doctrine concerning the use of "least intrusive means" and had failed to consider the ample array of other means available to the Board. In her petition, Robertson suggested a number of obvious alternatives to Item 28(b) that the Florida Supreme Court might adopt which would be less intrusive and still serve the compelling state interest recognized by the court. See *infra* at p. 25.

In response, the Board erroneously argued only that Robertson's petition was not timely and that the alternatives suggested therein had all been argued to the court by Robertson before. On February 9, 1984, the Florida Supreme Court, without explanation, simply denied Robertson's petition for rehearing just as months before it had denied her petition for review. (A. 2).

REASONS FOR GRANTING THE WRIT

I. ITEM 28(b) VIOLATES BAR APPLICANTS' RIGHT TO PRIVACY BECAUSE IT GRATUITOUSLY INTRUDES INTO, AND REQUIRES DISCLOSURE OF, HIGHLY INTIMATE PSYCHOLOGICAL CONSULTATIONS.

A. The Decisions Of This Court Explicitly Recognize A Right To Privacy Which Limits Access To The Information Sought In Item 28(b).

The federal constitutional right to privacy recognized by this Court has at least three distinct facets. The first is the right of the individual to be free in her private affairs from governmental surveillance and intrusion. *E.g., Katz v. United States,* 389 U.S. 347 (1967); *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled, Berger v. New York,* 388 U.S. 41 (1967), *overruled, Katz v. United States, supra.* The second is the right of the individual not to have her private affairs disclosed to the public. *E.g., Nixon v. Administrator of General Services,* 433 U.S. 425 (1977). Finally, the right includes the individual's freedom to make certain intimate decisions free of governmental interference. *E.g., Roe v. Wade,* 410 U.S. 113 (1973); *Griswold v. Connecticut,* 381 U.S. 479 (1965). *See generally* T. Gerety, *Redefining Privacy,* 12 Harv.Civ.R.-Civ.Lib.L.Rev. 233 (1977).

In this case, all three strands of the privacy right are implicated. With Item 28(b), the State intrudes into what has traditionally been regarded as one of the most private of relationships, that between a psychotherapist and his patient. *See* § 90.503(2), Florida Statutes (psychotherapist-patient privilege). Psychological consultations

inherently involve the most intimate private facts. Yet The Florida Bar applicant is required both to disclose the nature of her consultations and to waive the privilege itself, without regard to the actual relevancy of the consultations. Thus, whether they relate to past marital or sexual problems, depression, or the trauma of losing a family member, disclosure and waiver are required. Even when such problems are immaterial to the applicant's fitness to practice law, and despite the fact that practicing lawyers are themselves under no obligation to make such disclosures to the Bar, applicants must make an unconditional disclosure of such matters. Moreover, no matter how remote in time the consultation Item 28(b) requires the applicant to divulge its content.

The case of Robertson is illustrative. Robertson had been a nun. Years later, when "mildly depressed," she sought the counseling of a qualified psychiatrist. She was helped to realize she was in a transitional phase in her life and needed a change; she decided to attend law school. Robertson's counseling thus concerned a very private part of her life. A decision of such intimacy to the individual can be of no legitimate concern to the Florida Board of Bar Examiners. There is no reason Item 28(b) need be written so broadly that it encompasses counseling for problems such as frigidity, impotency, rape trauma, and the like, which are so intimate to the applicant and so irrelevant to the Board's proper function.

Item 28(b) also impinges on the disclosural privacy right. The question forces the applicant to disclose clearly private facts to the Board of Bar Examiners without sufficient guarantees that the information disclosed will remain "confidential". This Court has held properly limited disclosure of private facts constitutional but the disclosure

here is not so limited. *E.g., Nixon v. Administrator of General Services, supra; Whalen v. Roe,* 429 U.S. 589 (1977). In holding the screening by archivists of Mr. Nixon's presidential papers proper, the *Nixon* Court focused particularly on the fact that no less intrusive alternative to the comprehensive screening existed, noting further that the archivists were professionals with a reputation for discretion. Here, in contrast, there is no suggestion that any attempt has been made to narrow the breadth of the required disclosure. Item 28(b) certainly betrays no evidence of fine-tuning. Moreover, the Board, with all due respect, is not composed of a group of independent specialists whose silence may be presumed. Its members are attorneys and lay people appointed by the Florida Supreme Court from a pool of individuals recommended by the Board of Governors of the Florida Bar and by the Board itself. Article I, Sections 2 & 3, Rules of the [Florida] Supreme Court Relating to Admissions to the Bar. There is no provision for sanctions should a Board member (lacking corrupt intent) improperly disclose confidential information. Sections 839.25 and 839.26, Florida Statutes. Indeed, strict confidentiality is not even promised. The Board is authorized to disclose information concerning an applicant in certain enumerated circumstances. Article I, Section 14, Rules of the [Florida] Supreme Court Relating to Admissions to the Bar.

Finally, Item 28(b) impinges on the applicant's right to decisional autonomy. The knowledge that intimate facts will have to be disclosed if (i) counseling is sought and (ii) one intends to apply for membership in The Florida Bar interferes with an applicant's private decision-making in either of two ways. Given the certainty of ultimate disclosure, a potential applicant may choose simply to forego needed counseling or treatment. Such a de-

cision, forced by Item 28(b), could have substantial ramifications in the individual's life. In this case, counseling helped Robertson make a drastic change in her life. Without the help of psychological counseling, she might have been unable to identify what troubled her and thus never have made the decision to enter law school.

Alternatively, the potential applicant may choose instead to forego the practice of law in Florida rather than disclose facts concerning past consultations. Thus, in the name of "fitness", Item 28(b) successfully encourages troubled individuals who need help not to seek it and discourages those who may have sought help, and so benefited, from practicing law in Florida. Whether such is its conscious intent, Item 28(b) serves as an improper barrier to entry into the legal profession.

B. The Decisions Of This Court Explicitly Hold That Regulations Which Impinge On The Privacy Of The Individual Must Be "Reasonably Designed" To Further A Compelling State Interest In Order To Be Valid.

The right to privacy is not absolute. The Board of Bar Examiners is charged by the Florida Supreme Court with ensuring that applicants for membership in the Bar are qualified and fit in all respects to practice law. Certain inquiries *must* be made; all states request information from applicants indicative of proper moral and psychological fitness and character. The difficulty with Item 28(b) is that it is excessively intrusive, gratuitously violating an applicant's privacy by requesting irrelevant but highly intimate personal facts. It is the overreaching character of Item 28(b) that renders it constitutionally defective. As

this Court ruled last Term in *City of Akron v. Akron Center For Reproductive Health, Inc.*, 51 U.S.L.W. 4767, 76 L.Ed.2d 687, 103 S.Ct. 2481 (1983), when a privacy right is at stake:

> [T]he existence of a compelling state interest . . . is only the beginning of the inquiry. The State's regulation may be upheld only if it is reasonably designed to further that state interest.

51 U.S.L.W. at 4772.

Thus, in *City of Akron*, the Court invalidated the provisions of an Akron, Ohio, ordinance which required hospitalization for all second-trimester abortions. The State, the Court found, had not made a "reasonable effort to limit the effect of its regulations" to serving the particular state interest at issue. This case, like *City of Akron*, involves a state that has made no attempt to "tailor" its regulation to serve the compelling state interest involved and yet minimize the intrusion into the purely personal life of the individual. Instead, the Florida Board of Bar Examiners has chosen to employ the *most* intrusive of means in its screening of applicants.

Such overbroad intrusion is needless and aberrant. Less intrusive alternatives are employed, apparently without ill effect, in virtually every other state. Indeed, only two states, Delaware and South Carolina, currently employ the overbroad and insensitive method of inquiry used by Florida. Item 28(b) could be easily amended without thwarting the state's necessary "character and fitness" investigation. Applications from other states present a broad spectrum of possibilities. For instance, Florida could, at a minimum, qualify Item 28(b), as have several other states which ask essentially the same question, by recognizing the following exceptions:

> You may omit isolated instances of consultation for conditions of emotional stress or short term counseling for marital problems.

Colorado Bar Application, Question 28 (excerpt). *See also* Georgia Bar Application; North Carolina Bar Application. (Supp. App.) A modification of this type at least eliminates the need for the disclosure of counseling such as Robertson's.

But Florida's inquiry can and should be, as it is in most states, even less intrusive. At this writing, counsel is aware of four states which ask no questions relating to past psychological consultations.[8] These states rely on investigations into the applicant's present character and fitness. Ironically, Florida also requires the applicant submit to one of the nation's most extensive investigations of present character and fitness of applicants. This investigation routinely requires six to eight months to be completed and involves interviews with friends, neighbors, teachers, associates and employers of the applicant, and any other individuals who would be likely to know whether the applicant was mentally "fit" to practice law. Alternatively, nine states limit their inquiries to whether the applicant has ever been adjudicated mentally incompetent.[9] Four states ask only whether the applicant has ever been institutionalized[10] and ten inquire into *both* legal incompetence and institutionalization.[11] Of the remaining

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8. These include California, Indiana, Kentucky and New Hampshire. (Supplemental Appendix, to be filed).

9. The District of Columbia, Idaho, Illinois, Massachusetts, Nebraska, Rhode Island, Tennessee, Virginia and Wyoming ask *only* whether the applicant has been judicially declared incompetent. (Supplemental Appendix, to be filed).

10. Louisiana, Maryland, New Jersey, West Virginia ask *only* whether the applicant has been institutionalized. (Supplemental Appendix, to be filed).

11. Arizona, Kansas, Iowa, Michigan, Missouri, New Mexico, New York, South Dakota, Utah, Vermont, ask *both*. (Supplemental Appendix, to be filed).

eighteen states, those surveyed by counsel all pose questions more limited in scope than Florida's Item 28(b).[12] In this way, many states restrict their inquiry to the treatment of mental disorders which might plausibly have some bearing on the applicant's present fitness to practice law.

Robertson suggested still other options in her rehearing petition. Florida could limit its inquiry to a relevant time period, requiring disclosure only of consultations in the five years immediately preceding application, unless the investigation into the applicant's present character and fitness revealed the presence of psychological problems. Alternatively, the Board could limit the substantive scope of the inquiry by promulgating a list of matters it deemed irrelevant and thus which applicants would not be required to disclose. Still another possibility would be to promulgate fitness criteria and to delegate the relevancy determination and possible disclosure to the professional discretion of the applicant's psychotherapist.

Any survey of the alternative means available, including those employed by other states, indicates that Florida's Item 28(b) is far too broadly drawn. The compelling state interest in choosing a competent Bar will not support so intrusive an inquiry when important privacy rights are at stake and less intrusive alternatives are so readily available.

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12. Eight of these states—Alabama, Arkansas, Maine, Minnesota, Nevada, North Dakota, Ohio and Oklahoma—ask whether the applicant has received "treatment" for "mental illness" or "disorder." Two—Mississippi and Washington—ask a similar question but restrict it further with a five-year time limitation. Still another—Alaska—limits its inquiry to treatment "bearing on fitness." (Supplemental Appendix, to be filed).

The inquiries conducted by those states not specifically mentioned here will be reported in the Supplemental Appendix counsel intends to file when its survey is complete.

C. The Decision Of The Florida Supreme Court Requiring A Bar Applicant To Disclose All Prior Psychological Consultations Unconstitutionally Burdens The Qualified Applicant's Right To Practice Law.

More than the potential applicant's right to privacy is at stake. Also at issue is her right, if she is otherwise qualified, to practice law. It is well settled that when government chooses to offer a benefit which it might otherwise withhold entirely, it must do so in a manner that does not needlessly chill the exercise of some constitutional right. *See generally,* Note, *Another Look at Unconstitutional Conditions,* 117 U.Pa.L.Rev. 144 (1968). It may not, for example, condition the receipt of a welfare benefit on the sacrifice of a First Amendment right to practice one's religion. *Sherbert v. Verner,* 374 U.S. 398 (1963).

It is thus no answer here for the Supreme Court of Florida to state that the practice of law in Florida is a "privilege" that may be granted or withheld as the state chooses. *Florida Board of Bar Examiners Re: Applicant,* 443 So.2d 71, 74 (Fla. 1983). For an otherwise qualified applicant, the practice of law is a *right,* just as a welfare benefit is a right for the individual otherwise entitled to it. *See, e.g., Baird v. State Bar of Arizona,* 401 U.S. 1, 8 (1971). The Florida Board of Bar Examiners cannot force the applicant to exchange her constitutionally guaranteed right to privacy for the privilege of law practice when the exchange is needless. *See United States v. Jackson,* 390 U.S. 570, 582 (1968) (However proper a legislative objective may be, it can not "be pursued by means that needlessly chill the exercise of basic constitutional rights."); *see also In re Stolar,* 401 U.S. 23, 30 (1971) (question at issue "could hardly have been necessary for a State interested only in whether [the applicant] would make an honest lawyer faithful to his clients").

II. REVIEW OF THIS CASE IS OF FUNDAMENTAL IMPORTANCE.

This Court has a special duty and responsibility to superintend access to membership in the legal profession. This role becomes even more compelling when the construction of federal rights is implicated by restrictions on Bar membership or the means employed to determine fitness for the Bar. The Rules of the Florida Supreme Court Relating to Admissions to the Bar require, as do the rules of other states, that applicants produce, "satisfactory evidence to the Board of good moral character and an adequate knowledge of the standards and ideals of the profession." Article III, Section 2. Unlike most other states, however, Florida has chosen to implement this requirement with an application question, Item 28(b), which needlessly and destructively intrudes upon the federal privacy right of applicants. Such a question cannot be permitted to stand when so many better and less intrusive alternatives exist from which Florida may choose.

As Justice Brandeis noted, "one of the happy incidents of the Federal system" is that the states may serve as laboratories in which "novel social and economic experiments" may be tried. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Indeed, the broad spectrum of inquiries made in the bar fitness area by the states is evidence of the vitality and creativity of that system. Yet, on occasion, an experiment may fail. It is then the essential function of this Court to intervene and right the error. Florida's Item 28(b) is such a failed experiment. This Court should act now to strike down the question and provide the Bars of all states badly needed guidance regarding the limits the federal right to privacy places on inquiries into the past psychological counseling of bar applicants.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Florida Supreme Court should be granted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition for Writ of Certiorari was served May 9, 1984 in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States by depositing three true copies in a United States post office or mailbox, with first-class postage prepaid, addressed to:

C. Graham Carothers
Post Office Box 391
Washington Square Building
Tallahassee, Florida 32302

/s/ PARKER D. THOMSON

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No.

Office - Supreme Court, U.S.
FILED
MAY 9 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1983

MARY ANNE ROBERTSON, *Petitioner,*

vs.

FLORIDA BOARD OF BAR EXAMINERS,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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FLORIDA BOARD OF BAR EXAMINERS

RE: APPLICANT.

No. 60550.

Supreme Court of Florida.

Nov. 10, 1983.

Rehearing Denied Feb. 9, 1984.

Original Proceedings—The Florida Board of Bar Examiners.

Parker D. Thomson and Richard J. Ovelmen of Paul and Thomson, Miami, for petitioner.

Marvin E. Barkin, Chairman, Tampa, and C. Graham Carothers, Tallahassee, for respondent, Florida Board of Bar Examiners.

PER CURIAM.

Petition for review is denied. *Florida Board of Bar Examiners re Applicant,* 443 So.2d 71 (Fla.1983).

It is so ordered.

ALDERMAN, C.J., and BOYD, OVERTON and McDONALD, JJ., concur.

ADKINS, J., dissents.

FLORIDA BOARD OF BAR EXAMINERS

RE: APPLICANT.

No. 60550.

Supreme Court of Florida.

February 9, 1984.

On consideration of this Motion for Rehearing filed by attorneys for Applicant and reply thereto,

IT IS ORDERED by the Court that said Motion be and the same is hereby denied.

Sid J. White
Clerk, Supreme Court

By: /s/
Deputy Clerk

cc: Parker D. Thomson, Esquire
Richard J. Ovelmen, Esquire
Marvin E. Barkin, Esquire
C. Graham Carothers, Esquire

FLORIDA BOARD OF BAR EXAMINERS

RE: APPLICANT.

No. 63161.

Supreme Court of Florida.

Nov. 3, 1983.

Rehearing Denied Jan. 25, 1984.

In original proceedings, bar admission applicant sought review of ruling by the state Board of Bar Examiners refusing to process bar admission application until applicant answered certain questionnaire items and authorized release of certain records. The Supreme Court, Alderman, C.J., held that: (1) action of the state Board of Bar Examiners in requiring bar admission applicant to disclose history of psychological and medical treatment and to authorize release of all records, medical and otherwise, relevant to applicant's good moral character and fitness to perform responsibilities of an attorney was least intrusive means to achieve compelling state interest and did not violate state or federal constitutional privacy provisions, nor did it contravene applicant's due process rights or rights guaranteed by state constitutional section providing that no person shall be deprived of any right because of physical handicap, and (2) Board's requirement did not violate applicant's rights under statutory provision relating to confidentiality of psychotherapist-patient communications, inasmuch as applicant himself placed mental and emotional fitness, as well as moral and educational fitness, in issue when he filed application seeking admission to practice law.

Board action approved.

Adkins, J., dissented and filed opinion.

1. Constitutional Law (Key) 82(7)

Privacy right under Florida Constitution was not intended to provide absolute guarantee against all governmental intrusion into private life of individual. West's F.S.A. Const. Art. 1, §23.

2. Constitutional Law (Key) 82(7)

Action of the state Board of Bar Examiners in assisting the Supreme Court in regulating admission of persons to practice of law constitutes governmental action, for purposes of constitutional privacy provision. West's F.S.A. Const. Art. 1, § 23; Art. 5, § 15.

3. Attorney and Client (Key) 3
Constitutional Law (Key) 82(6)

No constitutional right exists to be admitted to state bar; rather, practice of law is a privilege. West's F.S.A. Admission to Bar, Art. 3, § 2.

4. Constitutional Law (Key) 82(7)

Compelling state interest or strict scrutiny standard imposes heavy burden of justification upon state to show important societal need and use of least intrusive means to achieve that goal.

5. Constitutional Law (Key) 82(7)

State's interest in ensuring that only those fit to practice law are admitted to the bar is a compelling state interest for purposes of strict scrutiny standard of review of admission requirements as a purported intrusion on right of privacy. West's F.S.A. Admission to Bar, Art. 3, § 2.

6. Attorney and Client (Key) 7

In view of lawyer's constant interaction with public, wide range of factors must be considered in bar admission applicant's screening process which would not customarily be considered in licensing of tradesman and businessman. West's F.S.A. Admission to Bar, Art. 3, § 3(a).

7. Constitutional Law (Key) 82(7)

Action of the state Board of Bar Examiners in requiring bar admission applicant to disclose history of psychological and medical treatment and to authorize release of all records, medical and otherwise, relevant to applicant's good moral character and fitness to perform responsibilities of an attorney was least intrusive means to achieve compelling state interest and did to [sic] violate state constitutional privacy provision. West's F.S.A. Const. Art. 1, § 23; West's F.S.A. Admission to Bar, Art. 3, § 3(a).

8. Constitutional Law (Key) 82(7)

Privacy interests encompassed within decision making or autonomy zone of privacy, to which compelling state interest test is applicable, are only those which are fundamental or implicit in concept of ordered liberty.

9. Constitutional Law (Key) 82(7)

Requirement of Board of Bar Examiners that bar admission applicant disclose history of psychological and medical treatment and authorize release of all records, medical and otherwise, relevant to applicant's good moral character and fitness to perform responsibilities of an attorney does not violate applicant's federal constitutional right of privacy. U.S.C.A. Const.Amend. 4.

10. Constitutional Law (Key) 287.2(5)

Requirement of state Board of Bar Examiners that bar admission applicant disclose history of psychological and medical treatment and authorize release of all records, medical and otherwise, relevant to applicant's good moral character and fitness to perform responsibilities of an attorney does not violate applicant's due process rights, or section of State Constitution providing that no person shall be deprived of any right because of physical handicap. U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 1 § 2.

11. Attorney and Client (Key) 7

Refusal by state Board of Bar Examiners to process bar admission application, due to failure of applicant to respond to inquiries requiring disclosure of history of psychological and medical treatment and authorization of release of all records, medical and otherwise, relevant to applicant's good moral character and fitness to perform responsibilities of an attorney did not violate applicant's right under state statutory provision relating to confidentiality of psychotherapist-patient communications; by filing application for admission to practice law in state, applicant himself placed mental and emotional fitness, as well moral and educational fitness, in issue. West's F.S.A. §§ 90.503, 90.503(4)(c).

Steven M. Goldstein, Tallahassee, for petitioner.

Marvin E. Barkin, Chairman, Tampa, and C. Graham Carothers, Tallahassee, for respondent, Florida Board of Bar Examiners.

ALDERMAN, Chief Justice.

Applicant seeks review of a ruling by the Board of Bar Examiners refusing to process his application for ad-

mission to The Florida Bar until he answers item 28(b) of the applicant's questionnaire and affidavit and until he executes the authorization and release form required by the Rules of the Supreme Court Relating to Admissions to the Bar. Applicant maintains that the Board's action violates his right of privacy and his right to due process of law guaranteed by the Florida and United States Constitutions, and his rights guaranteed by section 90.503, Florida Statutes (1981), and article I, section 2 of the Florida Constitution. We find no merit to his contentions and approve the decision of the Florida Board of Bar Examiners requiring applicant to complete all portions of the questionnaire, including item 28(b), and to execute an unaltered authorization and release form before the Board will process his application for admission to The Florida Bar.

Applicant applied for admission to The Florida Bar in April 1982 by submitting application for admission form No. 1 and a modified authorization release. On his authorization release, he included a proviso that his release did not apply to his medical records. On his application, he expressly declined to answer question 28(b) on the basis that it violates his constitutional rights. In answering the questionnaire, the applicant disclosed under item 12 that he had served on active duty with the United States Marine Corps and that he had not been discharged, but rather had been transferred to a temporary retired list for medical reasons and later had been retired.

Item 28(b) asks:

> Have you ever received REGULAR treatment for amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder? .....
>
> Yes or No

> If yes, please state the names and addresses of the psychologists, psychiatrists, or other medical practitioners who treated you. (Regular treatment shall mean consultation with any such person more than two times within any 12 month period.)[1]

The authorization and release form provided by the Board in compliance with the rules of admission states:

> I, ..., having filed an application with the Florida Board of Bar Examiners and fully recognizing the responsibility to the Public, the Bench, and the Bar of this State lodged with the Florida Board of Bar Examiners by the Supreme Court of Florida under the Constitution of the State of Florida to determine that only those of high character and ability are admitted to The Bar of Florida, hereby authorize and request every medical doctor, school official, and every other person, firm, officer, corporation, association, organization or institution having control of any documents, records or other information pertaining to me *relevant to my good moral character and fitness to perform the responsibilities of an attorney,* to furnish the originals or copies of any such documents, records and other information to said Board, or any of its representatives, and to permit said Board, or any of its representatives, to inspect and make copies of any such documents, records and other information including but not limited to any and all medical reports, laboratory reports, X-rays, or clinical abstracts which may have been made or prepared pursuant to, or in connection with, any examina-

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1. By letter dated August 23, 1982, the executive director of the Board advised applicant that question 28(b) was reviewed at a recent Policy Session of the Board, and the number of visits to a psychologist, psychiatrist, or other medical practitioner was raised to four times in any twelve-month period.

tion or examinations, consultation or consultations, test or tests, evaluation or evaluations, of the undersigned.

I hereby authorize all such persons as set out above to answer any inquiries, questions, or interrogatories concerning the undersigned which may be submitted to them by the Florida Board of Bar Examiners or its authorized representative, and to appear before said Board, or its authorized representative, and to give full and complete testimony concerning the undersigned, including any information furnished by the undersigned. I hereby relinquish any and all rights to said reports, including but not limited to clinical abstracts, consultations, evaluations, or any other information incident in any way to cooperation with the Florida Board of Bar Examiners, or its authorized representative, and fully understand that I shall not be entitled to have disclosed to me the contents of any of the foregoing.

I hereby release and exonerate every medical doctor, school official, and every other person, firm, officer, corporation, association, organization or institution which shall comply in good faith with the authorization and request made herein from any and all liability of every nature and kind growing out of or in anywise pertaining to the furnishing or inspection of such documents, records and other information or the investigation made by said Florida Board of Bar Examiners. The undersigned further waives absolutely any privilege ....he may have *relevant to h..... good moral character and fitness to perform the responsibilities of an attorney* under Sections 90.242 and 490.32 Florida Statutes.

(Emphasis supplied.)

The executive director of the Board, on behalf of the Board, advised the applicant that processing of his application would be withheld for ten days pending receipt of an executed and unaltered authorization and release and a response to question 28(b). More correspondence between the Board and the applicant ensued for several months, concluding in the Board's decision not to process his application until he complied with the requirements of the Board.

[1] Applicant seeks review of the Board's refusal to process his application and initially contends that to require him to answer question 28(b) and to submit an unconditional authorization and waiver violates his constitutional right of privacy under the Florida and United States Constitutions.

Article 1, section 23 of the Florida Constitution provides:

> Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Applicant concedes and we agree that this constitutional provision was not intended to provide an absolute guarantee against all governmental intrusion into the private life of an individual.

[2] Preliminarily, we must determine whether the requirement that applicant answer item 28(b) and execute the authorization and release falls within the governmental intrusion as contemplated by article I, section 23, and, if so, we must decide whether this intrusion violates the applicant's constitutional right of privacy. The action of

the Board clearly is not within the exception proviso of article I, section 23.[2] It is just as evident that the Board's action does constitute governmental action. The exclusive jurisdiction to regulate admission of persons to the practice of law is vested in this Court. Art. V, § 15, Fla. Const. We established the Florida Board of Bar Examiners as an arm of this Court to assist us in this function.

[3] We also find that the applicant's right of privacy is implicated by item 28(b) and the authorization and release form which allow a limited intrusion into his private life. The extent of his privacy right, however, must be considered in the context in which it is asserted and may not be considered wholly independent of those circumstances. He has chosen to seek admission into The Florida Bar. He has no constitutional right to be admitted to the Bar. Rather, the practice of law in this state is a privilege. *State ex rel. The Florida Bar v. Evans,* 94 So.2d 730 (Fla.1957). In this case, the applicant's right of privacy is circumscribed and limited by the circumstances in which he asserts that right. By making application to the Bar, he has assumed the burden of demonstrating his fitness for admission into the Bar. Fla.Sup.Ct. Bar Admiss. Rule, art. III, § 2. This encompasses mental and emotional fitness as well as character and educational fitness.

[4] Although circumscribed and limited by the context in which it is asserted, the applicant does have a right of privacy, and we must determine whether it has been unconstitutionally intruded upon by the Board's requirements. We have not yet decided a case in which

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2. The exception proviso of article 1, section 23, states:

"This section shall not be construed to limit the public's right of access to public records and meeting as provided by law."

we have had to determine the appropriate standard of review in assessing a claim of unconstitutional governmental intrusion into one's privacy rights under article I, section 23. We need not make that decision in the present case since we find that the Board's action meets even the highest standard of the compelling state interest test.

The compelling state interest or strict scrutiny standard imposes a heavy burden of justification upon the state to show an important societal need and the use of the least intrusive means to achieve that goal. *Carey v. Population Services International*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *In re Estate of Greenberg*, 390 So.2d 40 (Fla. 1980).

[5] Applicant concedes and we agree that the state's interest in ensuring that only those fit to practice law are admitted to the Bar is a compelling state interest. He admits that there is a legitimate need for the intrusion. His concern is not with the end sought to be achieved by the Board but is rather with the means employed by the Board to fulfill its responsibilities. He asserts that the authorization and release form and item 28(b) are unnecessarily overbroad and suggests that there should be some time limitation relative to the information sought.

That the state has a compelling state interest in regulating the legal profession has been expressly recognized by the Supreme Court of the United States. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), that Court said:

> [A]s part of their power to protect the public health, safety, and other valid interests [states] have broad power to establish standards for licensing practitioners

> and regulating the practice of professions. . . . The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice and have historically been "officers of the courts."

421 U.S. at 792, 95 S.Ct. at 2016.

[6] In charging the Board with the duty to determine the character and fitness of applicants to The Florida Bar, we have required that:

> Prior to recommending an applicant for admission to practice the profession of law in Florida, the Florida Board of Bar Examiners shall conduct an investigation and otherwise inquire into and determine the character, fitness, and general qualifications of every applicant. In every such investigation and inquiry, the Board may obtain such information as bears upon the character, fitness and general qualifications of the applicant and take and hear testimony, administer oaths and affirmations, and compel, by subpoena, the attendance of witnesses and the production of books, papers and documents. Any member of the Board may administer such oaths and affirmations. Such investigations and inquiries shall be informal, but they shall be thorough, with the object of ascertaining the truth. Technical rules of evidence need not be observed. Any investigative hearing for such purpose may be held by a division of the Board consisting of not less than three members of the Board. Each division shall record its proceedings and shall report its decisions to the full Board. Formal hearings held in response to Specifications shall be conducted before a quorum of the Board which shall consist of not less than five members.

Fla.Sup.Ct. Bar Admiss. Rule, art. III, § 3(a). It is imperative for the protection of the public that applicants to the Bar be thoroughly screened by the Board. Necessarily, the Board must ask questions in this screening process which are of a personal nature and which would not otherwise be asked of persons not applying for a position of public trust and responsibility. Because of a lawyer's constant interaction with the public, a wide range of factors must be considered which would not customarily be considered in the licensing of tradesmen and businessmen. *The Florida Bar, Petition of Rubin,* 323 So.2d 257 (Fla. 1975). The inquiry into an applicant's past history of regular treatment for emotional disturbance or nervous or mental disorder requested by item 28(b) furthers the legitimate state interest since mental fitness and emotional stability are essential to the ability to practice law in a manner not injurious to the public. The pressures placed on an attorney are enormous and his mental and emotional stability should be at such a level that he is able to handle his responsibilities.

[7] We find that the Board has employed the least intrusive means to achieve its compelling state interest. The information sought by item 28(b) is vital to the Board in evaluating an applicant's fitness. To ensure that it has all of the information necessary for its evaluation, the Board rather than the applicant must be the judge of what part of the applicant's past history is relevant.

There is no precise list of medical conditions that may affect a person's fitness to practice law and no uniformity among people who suffer from these conditions. The means employed by the Board cannot be narrowed without impinging on the Board's effectiveness in carrying out its important responsibilities. A time limitation on the information sought could preclude the Board from obtaining

vitally relevant information which could impact on its decision as to an applicant's mental and emotional fitness to practice law. The fact that the information obtained in response to the Board's inquiry is held in confidence by the Board and by this Court minimizes the intrusion on an applicant's privacy. Additionally, the authorization and release form, contrary to applicant's assertion, is not a blanket release but rather is expressly limited to information *relevant* to an applicant's "good moral character and fitness to perform the responsibilities of an attorney." We hold that the Board's action does not violate article I, section 23 of the Florida Constitution.

[8, 9] We also hold that the Board's action does not violate applicant's federal constitutional right of privacy. In view of our disposition of this first issue, it is unnecessary for us to address, in any detail, applicant's claim that his federal constitutional privacy rights were violated. The threshold question for our analysis of that claim would be to determine which zone of privacy applicant's asserted privacy rights fell within. *Paul v. Davis,* 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). If we were to conclude they fell within the decision-making or autonomy zone of privacy interests we would be required to apply the compelling state interest test. The privacy interests encompassed within this zone of privacy are only those which are fundamental or implicit in the concept of order liberty. *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). These are matters relating to marriage, procreation, contraception, family relationships and child rearing, and education. *Paul v. Davis; Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.,* 379 So.2d 633 (Fla. 1980). The other privacy interests described by the Supreme Court of the United States in *Whalen v. Roe,* 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1976), and *Nixon v. Administrator of General Services,* 433 U.S. 425, 97 S.Ct.

2777, 53 L.Ed.2d 867 (1977), involve one's interests in avoiding public disclosure of personal matters. In this area, a balancing test has been held to be the appropriate standard of review— comparing the interests served with the interests hindered. *See Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir.1978).

Even applying the highest standard of review, we have already decided that the Board has demonstrated a compelling state interest and use of the least intrusive means to achieve that interest.

[10] We likewise find no merit to applicant's claim that the Board's challenged action violates his right to due process of law or that it violates his rights guaranteed by article I section 2 of the Florida Constitution, which provides in pertinent part that no person shall be deprived of any right because of physical handicap.

[11] Finally, applicant asserts that the refusal by the Board to process his application under the present facts violates his rights under section 90.503, Florida Statutes (1981). This statutory provision provides in pertinent part:

> (1) For purposes of this section:
>
> . . . .
>
> (c) A communication between psychotherapist and patient is "confidential" if it is not intended to be disclosed to third persons other than:
>
> . . . .
>
> (4) There is no privilege under this section:
>
> . . . .
>
> (c) For communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense . . . .

In response to applicant's reliance on the psychotherapist-patient privilege, we once again point out that it is applicant himself who placed his mental and emotional fitness as well as his moral and educational fitness in issue when he filed his applicant's questionnaire and affidavit, a preliminary step in seeking admission to practice law in Florida. Under section 90.503(4)(c), there is no privilege "[f]or communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense."

Accordingly, we approve the ruling of the Florida Board of Bar Examiners requiring applicant to answer item 28(b) and to file an unaltered authorization and release form. Until that time, the Board is fully warranted in not processing his application.

It is so ordered.

BOYD, OVERTON, McDONALD, EHRLICH and SHAW, JJ., concur.

ADKINS, J., dissents with an opinion.

ADKINS, Justice, dissenting.

As to the petitioner's claim predicated on the Florida Constitution, I agree with the majority that the state's interest in ensuring that only those fit to practice law are admitted to The Florida Bar is a compelling state interest. However, I must agree with the petitioner's assertion that the authorization and release form and item 28(b) are unnecessarily overbroad. I also agree with the majority's conclusion that mental fitness and emotional stability are essential to the ability to practice law in a manner not injurious to the public. However, I do not agree with the assertion that the means employed by the Board cannot

be narrowed without impinging on the Board's effectiveness in carrying out its responsibilities. As petitioner argues, it is difficult to conceive of information in which an individual has a greater legitimate expectation of privacy than medical records containing communications and other information between an applicant and a psychiatrist, psychologist, or counselor. Accordingly, information which is irrelevant to an applicant's ability to practice law in this state should not come within the scope of the Board's inquiry. An applicant's past treatment for some emotional disturbance, such as loss of a parent for instance, or treatment for amnesia which occurred, say, as a child ten or fifteen years ago surely is not relevant to the potential of that applicant to be a fit and worthy member of The Florida Bar today. At a minimum I feel there must be some time frame incorporated in question 28(b) and the authorization of the release of medical records relating to treatment for emotional disturbances, etc. In addition, I feel the form of the question seeking information about regular treatment for emotional disturbances, etc., could be phrased in terms which elicit information with regard to problems which, in the judgment of the medical community, impact on one's fitness to practice law. Such an approach would be consistent with the mandate of article I, section 23 of the Florida Constitution.

For these same reasons, I would hold that the Board's action also violates the applicant's federal constitutional right of privacy. I do not believe the least intrusive means have been employed and, if a balancing test were held to be the appropriate standard, the interests served by the question as it exists do not outweigh the privacy interests of the individual hindered.

APPLICATION TO FLORIDA BOARD OF BAR EXAMINERS (EXCERPT)

24. (a) Have you ever made application for a position the procurement of which required proof of good character, which application was denied? no If yes, Yes or No

then as to such application, state the name and address of the authority to whom it was addressed, date application was made, and the reasons for the denial.

(b) Have you ever held a license or certificate the procurement of which required proof of good character which license or certificate was revoked or suspended? no If yes, as to each such Yes or No

license or certificate, please state the date it was revoked or suspended, and the name and address of the issuing and revoking authority, and the reason for the revocation or suspension.

I have furnished a certified copy of the Order of Revocation or Suspension for each action listed above.

25. Are you or have you ever been addicted to or dependent upon the use of narcotics, drugs or intoxicating liquors or been accused of being addicted to or dependent upon said items? no If yes, please state the Yes or No

details, including dates.

26. Have you within the past ten years undergone treatment for or consulted any doctor about the use of drugs, narcotics or intoxicating liquors? no If yes, Yes or No

please state the approximate dates, details, circumstances, and names and addresses of the doctors so consulted.

I have directed each of the foregoing doctors to furnish directly to the Board any information requested by the Board in respect to any such treatment.

27. Have you ever been declared legally incompetent? no If yes, please give full details as to court, Yes or No
date and circumstances.

28. (a) Have you ever received diagnosis of amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder? no If yes, please state Yes or No
the names and addresses of the psychologists, psychiatrists, or other medical practitioners who made such diagnosis.

(b) Have you ever received REGULAR treatment for amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder? uncertain Yes or No
If yes, please state the names and addresses of the psychologists, psychiatrists, or other medical practitioners who treated you. (Regular treatment shall mean consultation with any such person more than two times within any 12 month period.)

[Answer] I would like a more specific definition of emotional disturbance and the nature of potentional inquiries before responding to this question.

I have directed each of the foregoing doctors and hospitals to furnish to the Board any information the Board may request with respect to any such treatment.

FLORIDA BOARD OF BAR EXAMINERS

Administrative Board of the Supreme Court of Florida

(Seal)

February 5, 1979

Ms. Mary Anne Robertson
4199 SW 67 Avenue, Apt. 2046
Davie, Florida 33314

Dear Ms. Robertson:

File No.: 22020-b

This will acknowledge receipt of your Applicant's Questionnaire and Affidavit with supporting documents.

The Board spent many hours deliberating on what constituted treatment under the wording of Item 28(b) and finally decided to define, for the purposes of the Board's application form, regular treatment as more than two consultations with a psychologist, psychiatrist or other medical practitioner within any twelve month period.

The Board makes inquiries relative to all information supplied by each applicant as needed to assure that it complies with its responsibilities as directed by the Supreme Court of Florida under Article II, Section 12 and Article IV, Section 19 of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar. All matters are kept strictly confidential and are viewed only by those connected with the admissions process in Florida. Matters in the past range from what seems to have been job counseling to extensive hospitalization of an applicant.

Amendment forms are enclosed for your use in responding to Item 28(b). Processing of your application for registra-

tion cannot begin until such time as your Applicant's Questionnaire and Affidavit is completed.

Processing of your application will be administratively withheld for a period of ten days after which time your application will be returned to you if you do not respond to this notice.

Very truly yours,

/s/ John H. Moore
John H. Moore
Executive Director

JHM:vl:bao

Enclosures: Amendment forms
Copy of Item 28(b)

AMENDMENT TO APPLICATION TO FLORIDA BOARD OF BAR EXAMINERS DATED FEBRUARY 28, 1979 (EXCERPT)

I, (Name) Mary Anne Robertson (File Number) 22020-b, understand that my application, whether filed as a registrant or as an applicant for admission to The Florida Bar, is a continuing application and for this reason amend my application with the following additional facts and information which correctly and fully bring the previously filed Applicant's Questionnaire and Affidavit and Amendments to Application to a current status. This amendment applies to Item(s) 28(b), of my application as follows:

I decline to answer the question at this time because I feel it violates my constitutional right to privacy.

I would hope the remainder of my application could be processed as usual.

Please inform me of the consequences of my failure to respond. Thank you.

FLORIDA BOARD OF BAR EXAMINERS

Administrative Board of the Supreme Court of Florida

(Seal)

March 7, 1979

Ms. Mary Anne Robertson
4199 SW 67 Avenue, Apt. 204c
Davie, Florida 33314

Dear Ms. Robertson:

File No.: 22020-b

This will acknowledge receipt of your amendment dated February 28, 1979 relative to Item 28(b).

Processing of your application for registration cannot begin until the information requested under Item 28(b) of the Applicant's Questionnaire and Affidavit is received. If this information is not received on or before March 17, 1979, your application will be returned to you.

The Supreme Court of Florida recently ruled in a similar situation that an applicant must file the required information under Item 28 before processing of the application by the Board could continue.

Very truly yours,

/s/ John H. Moore
John H. Moore
Executive Director

JHM:ker:bao

Enclosure: Admendment forms

FLORIDA BOARD OF BAR EXAMINERS

Administrative Board of the Supreme Court of Florida

(Seal)

March 20, 1979

Ms. Mary Anne Robertson
4199 SW 67 Avenue, Apt. 204C
Davie, Florida 33314

Dear Ms. Robertson:

File No.: 22020-b

In that you have failed to respond to the Board's letter of March 7, 1979 within 10 days of the date of that letter, your application is herein returned.

Very truly yours,

/s/ John H. Moore
John H. Moore
Executive Director

JHM:vl

Enclosures: Form 1

ACKNOWLEDGEMENT OF APRIL 17, 1979 TELEPHONE CONVERSATION FROM JOHN H. MOORE, EXECUTIVE DIRECTOR OF FLORIDA BOARD OF BAR EXAMINERS, TO MARY ANNE ROBERTSON (EXCERPT)

I have personally checked the appropriate order concerning the recent Court decision to require an applicant to fully respond to the Applicant's Questionnaire and Affidavit question that concerns you and find that the wording does not clearly tell you what I have indicated. Since the Petition is not public record you will have to petition the Court if you wish to test the matter.

4199 S.W. 67th Avenue
Davie, Florida 33314

June 14, 1979

Mr. John H. Moore
Executive Director
Florida Board of Bar Examiners
Tallahassee, Florida 32301

Dear Mr. Moore:

In reference to your memorandum of April 17, 1979, I interpret it to mean that the statement in your letter of May 7, 1979 was incorrect; therefore it would seem that I don't have to answer item 28(b) nor petition the court concerning that item. Would you please clarify the matter for me.

In addition, would you please tell me if the court order concerning the petition of the applicant is confidential.

Thank you.

Sincerely yours,

/s/ Mary Anne Robertson

ACKNOWLEDGEMENT OF JUNE 14, 1979 LETTER FROM JOHN H. MOORE, EXECUTIVE DIRECTOR OF FLORIDA BOARD OF BAR EXAMINERS, TO MARY ANNE ROBERTSON (EXCERPT)

Please be advised that it will be necessary for you to either respond completely, to the best of your ability, to Item 28 or petition the Board. However, the Board has consistently held that you must complete the Application in its entirety.

4199 S. W. 67th Avenue
Davie, Florida 33314

August 4, 1979

Mr. John H. Moore
Executive Director
Florida Board of Bar Examiners
Tallahassee, Florida 32301

Dear Mr. Moore:

I am in receipt of your memorandum of June 14, 1979. I would appreciate it if you could review the correspondence between us concerning question 28(b) of the Application for the Florida Bar. It appears that my initial inquiries which I consider valid have never been directly addressed, and subsequent communications have not clarified the matter. The following is a brief outline of those communications:

January 15, 1979 - Under 28(b) of the application I failed to respond with a "yes" or "no" but requested "a more specific definition of emotional disturbance and the nature of potential inquiries before responding to the question."

February 5, 1979 - In response, your letter stated that "matters are kept strictly confidential . . . and have ranged from what seems to have been job counseling to extensive hospitalization of an applicant."

February 28, 1979 - I amended my application declining to answer the question "because I feel it violates my conconstitutional right to privacy" and requesting that you "inform me of the consequences of my failure to respond."

March 7, 1979 - In response, your letter stated that my application would be returned if the information requested under item 28(b) was not received on or before March

17, 1979. You also stated that "The Supreme Court of Florida recently ruled in a similar situation that an applicant must file the required information under item 28 before processing of the application by the Board could continue."

March 13, 1979 - I spoke with you on the telephone requesting the name of the case to which you had referred. You suggested that I get that information from the Supreme Court since you didn't have the name of the case.

March 20, 1979 - My application was returned to me with a letter stating that "you have failed to respond to the Board's letter of March 7, 1979 . . ."

April 17, 1979 - Since the Supreme Court of Florida could not locate the case without a case number, I telephoned your office for the information. Joan from your office told me that you would get an order from the Court to have the information released to me.

April 17, 1979 - A memorandum from you subsequent to my telephone call of April 17 stated that you have "checked the appropriate order concerning the recent court decision . . . and find that the wording does not clearly tell you what I have indicated. Since the Petition is not public record you will have to petition the *Court* if you wish to test the matter."

June 4, 1979 - I requested clarification of your memorandum of April 17, 1979, and asked whether the court order concerning the petition of the applicant was confidential.

June 14, 1979 - A memorandum from you stated: "Please be advised that it will be necessary for you to either respond completely, to the best of your ability, to Item 28 or petition the *Board*. However, the Board has consistently held that you must complete the application in its entirety."

In summary, would you please answer the following questions:

1) What is the definition of emotional disturbance?

2) What is the nature of potential inquiries?

3) Is the court order concerning the petition to which you referred confidential?

4) If I want to pursue the matter further should I petition the Court or the Board?

5) If the petition is to be directed to the Board, what is the procedure for filing the petition?

Thank you for your attention to this matter.

Sincerely yours,

Mary Anne Robertson

FLORIDA BOARD OF BAR EXAMINERS

Administrative Board of the Supreme Court of Florida

(Seal)

August 23, 1979

Ms. Mary Anne Robertson
4199 S.W. 67th Avenue, #204C
Davie, FL 33314

Dear Ms. Robertson:

File No. 22020-b

Your letter of August 4, 1979 has been received.

Please use your own best judgment as to whether or not any treatment you ever received fits under the provision of the Board's application question #28. Each applicant is asked to respond to the items on the application to the best of his or her ability.

A positive response to Item 28 would normally generate Board inquiry to the appropriate sources and the information generated considered in the whole person contract by the Board at the usual final evaluation of your application.

The applicant to whom previous reference has been made, made the request that any order delivered by the court refer to him as anonymous thus his case is confidential.

You may at your option petition either the Supreme Court of Florida or this Board. A petition to the Board may be in letter form of a simple letter and should be accompanied by a $15.00 fee pursuant to Rule V, Section 58 of the Rules Relating to Admission to The Florida Bar.

Very truly yours,

/s/ John H. Moore
John H. Moore
Executive Director

JHM:pg:gu

4199 S. W. 67th Avenue
Davie, Florida 33314

September 24, 1979

Florida Board of Bar Examiners
1300 East Park Avenue
Tallahassee, Florida 32301

Re: Petition for Waiver

Dear Sirs:

This letter is to request a waiver of the requirement to respond to question 28(b) of the application to the Bar. Additionally, I would like you to consider rewording the question or omitting it entirely from the application for the following reasons:

1) As the question is worded, the meaning of the term "emotional disturbance" is ambiguous. To enable myself to honestly answer the question, I requested a definition for "emotional disturbance" and was given a response which defined "treatment" and described other applicants' interpretation of the term.

2) The regulations implementing Section 503 and 504 of the Rehabilitation Act of 1973 prohibit broad pre-employment and pre-admissions inquiries concerning past mental illness. Although these regulations only apply to Federally Assisted Programs, they give evidence to the fact that this type of inquiry can constitute discrimination against the handicapped, which is prohibited by state and local statutes.

3) If the confidential communication of a patient to a psychiatrist was privileged by statute at the time it was made, then it should remain confidential unless a compell-

ing state interest would require disclosure. It does not seem reasonable that the acquiring of information about whether an individual has consulted a psychiatrist, a psychologist, or a medical practioner [sic] more than two times during a twelve month period is relevant to the State's interest in determining the fitness of applicants for admission to the Bar. The public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy would appear to be more significant. Moreover, an individual should not be forced to waive the psychiatric/patient privilege by directing "each of the fore going [sic] doctors and hospitals to furnish to the Board any information the Board may request with respect to such treatment." (28b)

A random sampling of applications from other states reveals that no application has a question which is as broadly worded as that of Florida. (see enclosure). It is interesting to note that Mississippi and Virginia have no question regarding mental competency.

I object to being required to answer question 28(b) as a matter of principle. I would, therefore, appreciate a response to the issues raised in this letter as well as a response to the waiver request.

Sincerely yours,

/s/ Mary Anne Robertson
Mary Anne Robertson

encl.: Information on Applications from other States

FLORIDA BOARD OF BAR EXAMINERS

Administrative Board of the Supreme Court of Florida

(Seal)

October 24, 1979

Ms. Mary Anne Robertson
4199 SW 67 Avenue, Apt. 204 C
Davie, Florida 33314

Dear Ms. Robertson:

File No. 22020-b

This will advise you that this Board while in formal session during October 19, 1979 subsequent to consideration of your correspondence with the Board since February 1979 ruled that you must fully respond to Item 28(b) of the Florida Bar Application as stated to the best of your ability. Processing of your Application for Admission to The Florida Bar as a registrant cannot be initiated until such time as you respond to Item 28(b). A copy of Item 28(b) of the Florida Bar Application and amendment forms are enclosed for your convenience in this matter.

Very truly yours,

/s/ John H. Moore
John H. Moore
Executive Director

JHM:pg:bao

Enclosures: Item 28(b)
Amendment forms

CERTIFIED MAIL NO. 652436

RETURN RECEIPT REQUESTED

PAUL AND THOMSON
Attorneys at Law
1300 Southeast First National Bank Building
Miami, Florida 33131

December 12, 1980

CONFIDENTIAL

Mr. Alexander L. Hinson
121 North Madison Street
P.O. Box 550
Quincy, Florida 32351

Dear Mr. Hinson:

Confirming our telephone conversation, we represent Mary Anne Robertson, an applicant for the Florida Bar ("Applicant"). Applicant objects to responding to Question 28(b) of the application for The Florida Bar. Question 28(b) asks:

> "Have you ever received REGULAR treatment for amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder?"

None of these terms is defined and while the Board of Bar Examiners may understand them, its understanding is nowhere explicated. Question 28(b) applies where there has been *no* diagnosis of the existence of any of these "illnesses". Where there has been an affirmative diagnosis of their existence, Question 28(a) applies.

The term "regular" is defined to mean "consultation with any [psychologist, psychiatrist, or other medical practitioner] more than two times within any 12 month period." If "regular treatment" has occurred, then all psychologists, psychiatrists and other medical practitioners who "treated"

the applicant must be named and the applicant must direct "each of the foregoing doctors and hospitals" to give the Board "any information" the Board may request with regard to any such treatment.

From this jumble of undefined and vague terms one may conclude that if an applicant has seen a psychologist or psychiatrist more than two times in a year, one presumptively has been "treated" for one of the "illnesses" named in Question 28(b). A "yes" answer to the question is, of course, an admission by the applicant that seeing a psychologist or psychiatrist three times in a year means the applicant had or has one of the named "illnesses". Parenthetically, it should be noted that a psychologist is not a medical doctor so the reference to "other medical practitioner" is confusing.

Assumedly, although not clearly, visiting any "other medical practitioner" three times in one year is not presumptive of the incidence of and treatment for one of the named "illnesses".

What is the purpose of securing the information to be supplied in answer to Question 28(b)? Presumably the Board is charging itself with judging the applicant's past mental state and projecting that past into a possible future response of the applicant to responsibilities as a lawyer. Such a task would overtask the expertise of psychologists, psychiatrists and other professionally trained medical practitioners, much less the Board. But the Board must answer the question of "purpose". The Board must evaluate what information in the general area of "mental health" will actually be of predictive value to the Board in passing on potential future action as a lawyer. If the predictive value is nil, then the information should not be sought. While some information in the "mental health" area might have predictive value, evaluation of questionnaires by other

states indicates only actual *commitment* would make such information possibly relevant. At minimum, a serious consideration of the question of "purpose" should mandate deletion of Question 28(b).

The Unreasonableness of Question 28

Certainly Question 28(b) is vague, overbroad, and reaches into the Applicant's most intimate and privileged personal information. Its vagueness is such an applicant must make a self-diagnosis of his/her mental state in order to determine whether past consultations, if any, with psychologists, psychiatrists, or "other medical practitioners" were for the purpose of treating the "illnesses" named in Question 28(b). Without a more definitive explanation of these medical terms it is irrational for a prospective member of the Bar to be subjected to such an unreasonable burden.

The overbreadth of Question 28(b) results in excessive and unnecessary governmental intrusion into an applicant's private life. If an applicant interprets the terms in a manner which results in a negative response to Question 28(b), that individual exposes him/herself to reevaluation at some future date by the Board or The Florida Bar with "20-20 hindsight". On the other hand, if an applicant opts to "play it safe" and respond to Question 28(b) in the affirmative for fear of such subsequent reevaluation, the applicant is forced to unconditionally waive all rights to preservation of the secrecy of his/her communications with the mental health advisor.

Furthermore, Question 28(b) is a conclusive presumption that whenever an applicant consults a psychologist, psychiatrist or "other medical practitioner" three times within a 12 month period he/she is conclusively presumed to be undergoing *regular* treatment. It is highly question-

able whether any such presumption is justified. The consultations could have taken place on three consecutive days to resolve a passing personal crisis or, on the other hand, could have been on a "once every fourth month" basis to discuss any personal or intimate matter which had arisen within the previous four months, i.e., analogous to any routine dental checkup or automobile tune-up. It is therefore unreasonable to establish a conclusive presumption that either transitory or periodic visits to a psychologist, psychiatrist, or "other medical practitioner" are *regular* visits for *regular* treatment. Such unreasonable *conclusive presumptions* are unconstitutional. *Bass v. General Development Corp.*, 374 So.2d 479 (Fla. 1979), *following Weinberger v. Salfi*, 422 U.S. 749 (1975); *Gallie v. Wainwright*, 362 So.2d 936 (Fla. 1978).

A further serious consequence of the vagueness and overbreadth of the Question is its "chilling" effect on potential applicants in need of psychological and psychiatric consultation. Even if we assume, *arguendo*, the propriety of *some* inquiry into possible "mental illness", the consequence of the "regular treatment" definition of Question 28(b) may well be to discourage persons in need of psychological or psychiatric consultation from seeking it. This is certainly an unfortunate, and equally certainly an unnecessary, result.

Practice in Other States

Florida is one of the few remaining states with an inquiry into an applicant's mental health of the overbroad and overreaching nature of Question 28(b). A review of applicant questionnaires for certification as a lawyer of 23 other states reveals that, unlike Florida, virtually all other state examiners have either deleted inquiries into an applicant's mental health, or have, at most, nar-

rowly restricted inquiries to cases where there had been a prior adjudication of mental incompetence or where the applicant had been voluntarily or involuntarily committed to a mental health institution. A summary of this review is attached as Schedule A.

Generally speaking, other states have strictly limited the scope of inquiry. Only two of the states reviewed (Georgia and North Carolina) do have questions similar to Florida's Question 28. Nevertheless, even these two states recognize the sensitivity of this area and have qualified the definition of "emotional disturbance" to aid a prospective applicant in understanding the term and in responding to the question, in each case making clear the question is not intended to reach isolated instances of consultation for conditions of emotional stress.

This other-state review exhibits the lack of need of the Board for Question 28(b).

Privileged Communications

Section 90.242(2) Florida Statutes (1979) provides:

> (2) Except as hereinafter provided, in civil and criminal cases, in proceedings preliminary thereto, and in legislative and administrative proceedings, a patient or his authorized representative, has a privilege to refuse to disclose, and to prevent a witness from disclosing communications between patient and psychiatrist, or between members of the patient's family and the psychiatrist, or records relating to diagnosis or treatment of the patient's mental condition.

Although this statutory privilege may not apply to actions of the Board and, arguably, the filing of an application is a waiver of the privilege if otherwise applicable (a position we would categorically deny), the statute does

reflect strong social values which should be respected. An applicant's medical history includes the most intimate, and thus, the most privileged, of all areas of personal information. Conversations between a patient and his psychologist, psychiatrist, or "other medical practitioner" with respect to the matters covered by Question 28(b) are certainly within the most confidential of such communications. But in Question 28(b) the Board compels the prospective Florida lawyer to unconditionally waive all rights relating to consultations without setting limits on the collection of data, the handling and analysis of records or other data collected, the storing and possible subsequent destruction of such records and data, or even providing a termination date for the uncontrolled waiver.

All privileged communications of the type exposed by an affirmative response to Question 28(b) should be carefully shielded. Strict control over the collection, use, storage and destruction of these confidential records is mandated if the privacy rights of the patient are to be safeguarded and if the records or other data are to be removed from the exclusive control of the applicant or his/her doctor, and instead placed within the grasp of governmental agencies (such as the Board) and the courts. The applicant is entitled to know, in advance of giving an affirmative response, of the existence and effectiveness of such restrictions.

The Florida Constitution

In November an amendment to Article I of the Florida Constitution was adopted providing as follows:

> Section 23. *Right of privacy* - Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein.

The right to privacy thereby included in the Florida Constitution is an interest already protected to some degree by various provisions of the federal Constitution, including the First, Third, Fourth, Fifth, Eighth and Fourteenth Amendments.

The mandate of new Article I, Section 23 of the Florida Constitution is absolute. There is no indication the federal two-tier model of "rational basis" and "strict scrutiny" is to be applied. The text of this provision is derived from the Constitutional Revision Commission's proposals in 1978. Members of the Florida Ethics, Privacy and Elections Committee of that Commission concluded the federal "compelling interest standard" was too weak and limitations on the privacy right for compelling state interests were rejected. In addition, attempts to limit the privacy right to "unwarranted" or "unreasonable" governmental intrusions, rather than all intrusions, were rejected for fear the insertion of such modifiers would cause courts to apply the federal "rational basis" test. Cope, *To Be Let Alone: Florida's Proposed Right of Privacy,* 6 FLA. ST. L. REV., 673, 725, 746 (1978), *citing,* Fla. C.R.C. Ethics, Privacy and Elections Committee Minutes, 3 (Oct. 14, 1977).

The Board's questionnaire, drafted prior to the enactment of Florida's new constitutional "right to be let alone," must be reexamined and reevaluated in light of this contemporary development. Inquiries into privileged mental health records are constitutionally invalid and cannot continue.

Application of the Federal Constitutional Standard

Even if one were to assume Florida courts might contradict the drafters' intent and restrict the application of the new Florida Constitutional amendment, the Board, as

an agency of government, must, as a result of potential serious infringement on an applicant's fundamental right of privacy under the federal Constitution, prove the existence of an overriding and compelling state interest in limitless review of privileged records. We submit the Board cannot meet this burden of proof where there has been no professional diagnosis of the named "illness" and where the applicant must self-define the terms and the purpose for consultations.

Aside from proving the intrusion accomplishes a compelling state interest, the Board must additionally show that in conducting its investigations it has used the least intrusive means of doing so. The collection of this highly sensitive information is not the least intrusive means when *all* privileged medical records, on three consultations within a 12 month period, become reviewable without restriction.

Mental Health Today

The fields of psychology and psychiatry present the most difficult problems of confidentiality. Inquiries in this area, if any, must be strictly limited to matters of direct and immediate concern. The stigma which society has historically attached to "mental illness" as compared with the ills of the body necessitates strict care. Psychological and psychiatric treatment is impossible without trust. Such trust is often not necessary with the ills of the body; a surgeon can successfully set a broken limb even if the patient does not have total confidence in the surgeon's integrity. However, a psychotherapist often cannot aid his patient without assurance that the patient's most intimate personal secrets will remain undisclosed. Question 28(b) comes from an age where any consultation with mental health practitioners was automatically indicative of

a patient's presumed mental incapacity. The question presents a serious obstacle to the nationwide trend of seeking to improve mental health by encouraging counseling whenever deemed necessary, without fear of subsequent disclosure.

The Board of Bar Examiners must carefully reevaluate the questions on the applicant's questionaire regarding the applicant's mental health history. Question 28(b) is merely the most egregious. The Board must assure prospective applicants their constitutional rights, including their right of privacy, will be strictly safeguarded, especially under circumstances where the applicant has never been professionally diagnosed as suffering from anything.

Sincerely,

/s/ Parker D. Thomson
Parker D. Thomson

PDT:bjb

cc: Mr. John H. Moore
Ms. Mary Anne Robertson

SCHEDULE A

SUMMARY OF APPLICANT QUESTIONNAIRES: *Based on a review of applications from 23 states.*

1. Seven have no questions at all regarding mental competency or treatment.

2. Sixteen have no questions on treatment.

3. Fifteen have questions relating to prior adjudication of incompetence and/or commitment for mental illness.

4. Georgia and North Carolina have a question worded like Florida's Question 28(b). However, both states qualify the definition of emotional disturbance.

QUESTIONS ADDRESSING MENTAL HEALTH IN APPLICANT QUESTIONNAIRES FROM 23 STATES

A. *Alabama*:

1. Question 11-(a) (b) (c): Commitment as a voluntary patient and explanation.

B. *Arizona*:

1. Question 13(a): Adjudged incompetent; or treated or confined for mental or emotional disorders.

C. *Arkansas*:

1. Question 9(f): "Now suffering or ever suffered from or been treated for any mental illnesses."

D. *Idaho*: No question.

E. *Kansas*: No question.

F. *Kentucky*: No question.

G. *Maryland*:

1. "Have you within the past 10 years ever been a voluntary patient in any sanitarium, hospital or mental institution for the treatment of mental illness? If so, attach statement giving full explanation including name and address of doctor and institution."

"If so, attach statement giving full explanation including name and address of doctor and institution."

H. *Mississippi*: No question.

I. *Missouri*:

1. "Declared incompetent because of mental illness or condition, or committed, confined or treated in any institution for mental illness."

J. *Nebraska*:

1. "Have you ever been adjudicated an incompetent person, an insane person or a lunatic by any court? (yes or no)."
"Full details."

K. *New Hampshire*: No question.

L. *New Mexico*:

1. "Have you ever been adjudicated an incompetent person, an insane person or a lunatic by any Court?"
"Have you ever been a voluntary patient in any sanitarium, hospital or mental institution for the treatment of a mental illness? ..... If so, attach statement giving full explanation, including name and address of doctor and institution."

M. *North Carolina*:

1. "Have you ever been declared legally incompetent? ..... If so, please give full details as to Court, date, and circumstances."

"I have directed each of the foregoing doctors and hospitals to furnish to the Board any information the Board may request with respect to any such treatment."

a. Question with the same wording as Florida's 28(a) and (b) - combines treatment and diagnosis into one question.

b. Question adds in parenthesis: "This question is not intended to apply to isolated instances of consultation for conditions of emotional stress."

N. *North Dakota*:

1. "Have you ever been treated or confirmed for mental or emotional disorders, adjudged incompetent or insane by any court or declared a ward of the state. If so, give details."

O. *Ohio*:

1. "State whether you have been, or presently are:

(c) treated for mental illness;

(d) adjudged incompetent by any court;

(e) committed to or confined to any mental or correctional institution."

"If you ranswer to any section of the above question is "Yes" set forth the facts in detail . . ."

P. *Oklahoma*:

1. Question 8(d)(e)(f):

(d) "Have you ever been a patient of a mental institution or other similar hospital or institution? ..... (Yes or No)."

(e) "Have you ever been afflicted with or received treatment for amnesia, or any form of insanity or mental disorder, or suffered from any mental illness? ..... (Yes or No)."

(f) "Have you ever been under guardianship or declared a ward of the Court, other than a minor, or declared incompetent? ..... (Yes or No.)"

"Do you give your consent for the doctor who treated you to furnish to the Board of Bar Examiners any information requested by the Board in respect to such treatment? ..... (Yes or No)."

"Give details . . ."

Q. *Rhode Island*:

1. "Have you ever been adjudicated an incompetent person, or insane person or a lunatic by any Court?"

R. *South Dakota*:

1. "Have you ever been declared a ward of any Court, or adjudged an incompetent, . . . or have you ever been committed to any institution?"

S. *Tennessee*:

1. "Have you ever been adjudicated an incompetent person, an insane person or a lunatic by any Court. ....."

T. *Virginia*: No Question.

U. *Washington*: No Question.

V. *West Virginia*:

1. "Have you ever been a voluntary patient in any sanitarium, hospital or mental institution for the treatment of a mental illness. ..... If so, attach statement giving full explanation, including name and address of doctor and institution."

W. *Georgia*:

1. Question same as Florida's 28(b) with addition of:

"(This question is not intended to apply to isolated instances of consultations for conditions of emotional stress.)"

"I have directed each of the foregoing doctors and hospitals to furnish the Board any information the Board may request with respect to such treatment."

FLORIDA BOARD OF BAR EXAMINERS

Administrative Board of the Supreme Court of Florida

(Seal)

22 December 1980

Parker D. Thomson, Esq.
1300 Southeast First National Bank Building
Miami, Florida 33131

RE: Applicant Mary Anne Robertson

Dear Mr. Thomson:

I have received and reviewed your correspondence of December 12, 1980 regarding the referenced applicant. Since the objections you raise to question 28(b) and related questions on our application form are rather extensive, I have asked Mr. John Moore, our Executive Director, to forward a copy of your correspondence to Mr. Graham Carothers, the Board's attorney, for further study and evaluation. I have also asked Mr. Moore to agenda this particular item for consideration by the Board at its next "policy session" which will be during the Board's February 6-7, 1981 meeting.

Sincerely,

/s/ Alexander L. Hinson
Alexander L. Hinson
Chairman

ALH:kc

cc: John H. Moore, Executive Director
C. Graham Carothers, Board Attorney

FLORIDA BOARD OF BAR EXAMINERS

Administrative Board of the Supreme Court of Florida

(Seal)

February 16, 1981

Parker D. Thomson, Esquire
1300 SE 1st National Bank Building
Miami, Florida 33131

Dear Mr. Thomson:

In Re: *Mary Anne Robertson*
a/k/a: *Sister Charles Ellen Robertson*
File No.: *22020-b*

This will advise you that the Board while in formal session during February 6-7, 1981 reviewed your letter relative to the above-named applicant's objections to Item 28(b) of the Applicant's Questionnaire and Affidavit. Please be advised that the Board greatly appreciates your interest and input and has designated a special committee to review the entire application in view of your concerns and consideration of the recently enacted Right to Privacy amendment to the Florida Constitution.

Until such time as a decision is made which requires any part of the Applicant's Questionnaire and Affidavit to be revised your client will be required to complete all portions of the questionnaire as accurately and candidly as possible.

Please understand this Board will contact all doctors who are reported under Item 28(a) or (b) and in the majority of cases the Board's inquiry is satisfied at that point. It is hoped that this information will help relieve your client of any unnecessary fears of the system.

Please do not hesitate to write if you have further questions.

Very truly yours,

/s/ John H. Moore
John H. Moore
Executive Director

JHM:yc:vc

PAUL & THOMSON
Attorneys at Law
1300 Southeast First National Bank Building
Miami, Florida 33131

March 12, 1981

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. John H. Moore
Executive Director
Florida Board of Bar Examiners
1300 East Park Avenue
Tallahassee, Florida 32301

Application of Mary Anne Robertson
Your File No. 22020(b)

Dear Mr. Moore:

We have received your letter dated February 16, 1981 wherein you informed us that the Florida Board of Bar Examiners (the "Board"), at the formal policy session held on February 6-7, 1981 had decided to appoint a special committee to review the Applicant's Questionnaire and Affidavit (the "Application") in light of our concerns and objections as expressed in our letter to the Board dated January 16, 1981 on behalf of our client, Mary Anne Robertson.

We have advised Ms. Robertson to complete each and every portion of the Application other than Item 28(b), pending a final decision by the special committee, and her application as so prepared is enclosed. As counsel for Ms. Robertson we request the Board process the enclosed Application forthwith, with completion of Item

28(b) being dependent on the special committee's action. Please confirm that the Board is so doing.

Sincerely,

/s/ Parker Thomson

PDT:rew

cc: Mr. Alexander Hinson
Ms. Mary Anne Robertson

PAUL & THOMSON
Attorneys at Law
1300 Southeast First National Bank Building
Miami, Florida 33131

April 17, 1981

Mr. John H. Moore
Executive Director
Florida Board of Bar Examiners
1300 East Park Avenue
Tallahassee, Florida 32301

Application of Mary Anne Robertson
Your File No. 22020(b)

Dear Mr. Moore:

We are awaiting formal written notification of the Board's final administrative ruling denying our client's request that it process her application pending action of the "special committee" formed to review the Board's application requirements in light of the new Privacy Amendment to the Florida Constitution.

We hereby serve notice on the Board that upon receipt of the Board's formal denial of our client's request we shall file an appropriate Petition with the Florida Supreme Court appealing this decision pursuant to Article IV, Section 20(b) of the Rules of the Supreme Court Relating to the Admissions to the Bar. It is unfortunate the Board attaches greater weight to potential administrative inconvenience than to the probable deprivation of our client's fundamental privacy rights that coerced compliance with the application requirement would cause.

To avoid this unhappy result, our client will stipulate that she will complete her answer to question 28(b) in

accordance with the existing rules should the constitutionality of the Rule be upheld by a final appellate court. This stipulation is conditioned only upon the reciprocal stipulation by the Board that it process the application during the pendency of the litigation.

Please confirm that this stipulation is acceptable to the Board.

Sincerely,

PDT:cbw

cc: Mr. Alexander L. Hinson
Ms. Mary Anne Robertson

FLORIDA BOARD OF BAR EXAMINERS

Administrative Board of the Supreme Court of Florida

(Seal)

April 20, 1981

Parker D. Thomson, Esquire
1300 SE 1st National Bank Building
Miami, FL 33131

Dear Mr. Thomson:

In Re.: *Mary Anne Robertson*
File No.: *22020-b*

This will acknowledge your letter of February 12, 1981, your recent telephone call relative to the application of the above-named person and a direct call from Ms. Robertson. As stated by phone, the Board's position was properly outlined by letter dated February 16, 1981. The Board fully understands your client's position; however, there is no indication that the Board's special committee will develop recommendations over the short term and, in fact, it would appear that the Board will need judicial construction for guidance in order to make such recommendation.

Your client may amend Item 28(b) at this time and the normal background investigation will begin at once. In the meantime, the file will be held out of processing.

Yours truly,

/s/ Alexander L. Hinson
Alexander L. Hinson
Chairman

ALH:bao

cc: Registrant Robertson via Attorney Thomson

COMMITTEE ON GOVERNMENTAL OPERATIONS

Bill #: CS/HJR 387
Sponsor(s): Reps. Mills, Kiser & Moffitt
Relating To: Constitutional Amendment relating to a right of privacy

Other Committee Reference: None
Similar/Companion Bills:

February 7, 1980

I. SUMMARY

A. Present Situation

Presently, in Florida, there is no general state constitutional right of privacy.

B. Probable Effects of Proposed Changes

Passage of this resolution would submit for referandum, a constitutional amendment creating § 23, Art. I, State Constitution.

Section 23, Article I, State Constitution, would guarantee every natural person freedom from governmental intrusion into his private life except as otherwise provided in the Constitution. This section does not limit the public's right of access to public records and meetings as provided by law.

II. PRIVATE SECTOR/STATE/LOCAL FISCAL IMPACT

Not determinable at this time.

III. COMMENTS

According to the United States Supreme Court, "the protection of a persons *general* right to privacy—his right to be let alone by other people

—is, like the protection of his property and his very life, left largely up to the law of the individual states." *Kass v. U.S.*, 389 U.S. 347, 350-351 (1967). However, the Florida Supreme Court, in *Laird v. State*, 342 So. 2d 962 (Fla. 1977), held that it was clear that Florida has no general state constitutional right of privacy.

Additionally, the Florida Supreme Court overturned a First District Court of Appeal decision recognizing constitutional "Privacy of Personhood" and concluded that "under the federal constitution a person's disclosural privacy is not as broad as was found by the district court and that under our state constitution no broader right is granted." *Shevin v. Harless, Schaffer, Reid and Associates, Inc.*, Case Nos. 54,405 and 54,406, filed January 17, 1980.

At least ten (10) states have adopted express language in their constitutions to protect privacy, including Florida whose 1969 constitutional provision also protects "private communications" from unreasonable searches and seizures. Three (3) of these states have adopted a free-standing constitutional state right-of-privacy similar but not identical to the one being examined.

A similar amendment was agreed upon by the Constitution Revision Commission and included in the 1978 constitutional revision "package" for referendum.

IV. AMENDMENTS

None

PREPARED BY: Tina M. Williams

STAFF DIRECTOR: Ron

Executive Reorganization Subcommittee of Governmental Operations February 12, 1980

Chairman Mills: Next we have HJR 387 which has as its cosponsors Representatives Mills, Moffitt and Kiser. Who could disagree with a bill cosponsored by those people? What we wanted to do today since this has a relationship to the Privacy Bill and I want to have Tina explain the staff work she's done on it and have some questions on this today and again respond to this next time around because although it's a very simple one-line item, it has a very complex impact. So, Tina, if you would explain the massive research which you've done—it's really quite a bit.

Tina Williams: This bill, if it passes—Passage of this resolution would submit for referendum a constitutional amendment creating Section 23, Article I of State Constitution. This Section 23, if created, would guarantee to every natural person freedom from unwarranted governmental intrusion into his private life. In researching this bill, I noted that at least ten states directly have adopted express language in their constitutions to protect privacy. In these ten Florida is included because a 1968 constitutional provision protects private communications. Three states have adopted a free standing constitutional right of privacy similar but not identical to the one being examined. In the 1968 constitution revision packet, there was also a similar proposal to create a Section 23 to the State Constitution guaranteeing every natural person freedom from unwarranted governmental intrusion. Recent Supreme Court cases have indicated that our Supreme Court does not recognize a right of personhood as guaranteed in the Constitution.

Chairman Mills: Personhood isn't even in Webster's Dictionary.

Tina: Well, that's language from the case. I would like to answer questions now if I could.

Mills: Let me make a couple of comments on this. There is one difference from the Privacy Provision which was passed by the Constitution Revision Commission. Two? Well, one that was particularly of concern to some people on the Revision Commission was the word "unwarranted." It said free from governmental intrusion into private life, and there was some concern on the part of some people that this would do away with everything that the government does in terms of regulation which therefore could create a real problem. Therefore the word "unwarranted" was added to support what people thought the court would probably do anyway. The courts in reviewing this would reasonably assess what intrusion would be. Also the fact that the existence of those Florida Supreme Court cases supports the fact that this would add something that doesn't exist now and I think perhaps the Supreme Court would be happy to have that option. Anyway, there's another distinction?

Tina: The reasoning, well the Constitution Revision Commission's reasoning behind the right of privacy is to put it on an equal basis with the Sunshine Amendment or with the Open Government Amendment in the Constitution—to make it a fundamental right and just a note that the three states that have adopted free standing right to privacy in their constitutions have rarely ventured beyond the federal protective right of privacy in that state rights having to do with electronic surveillance, policing, taxing, they have not be affected at all.

Mills: Well, if there are no more questions on that we'll update that next . . .

Bill Conway: Assuming this becomes part of the Constitution, then if you or I had our privacy violated, then wouldn't we go to court? Couldn't we do it with or without the amendment?

Mills: We could go to court today but there is no constitutional right. One of the things generated . . .

Conway: I'm not opposed to it.

Mills: We could go to court. The problem that this attempts to respond to is that in fact Florida in drawing some boundaries has said there is no right to privacy. This is because the line of cases which made it difficult for them to do something else. And the fact that there is a federal right of privacy doesn't really help when you're relating to state government. This is a protection of the individual against state government. It doesn't have anything to do with private enterprise.

Conway: Why don't we vote it out today?

Mills: What a great guy! No, wait til you see how fast we pass them next time. Well, there were one or two issues that some of the newspaper people had that related to this, and that is as it concerns financial disclosure, that we wanted to make sure we had covered. And that's the only issue.

Financial disclosure?

Mills: Don't worry about it. Everything will be okay. Well, what I'd like to do it take that up as a committee bill, as a committee substitute so that we can play with it—the staff. So Mr. Nergard moves that and . . . We'll take that up as a committee bill, a committee substitute so that we can play with it in the interim. If there's no objection, it passes. Okay.

Executive Reorganization Subcommittee of Governmental Operations March 11, 1980

Chairman Mills: As long as we have some people here to testify on this other matter, on HJR 387, which also relates to the right of privacy, a constitutional amendment, maybe before we take any witnesses on that—Tina, is there any update you have on that? Does everyone have in their package the current version of that?

Tina: There has been a little change in the wording of this bill. If you'll notice on line 16, after "private life" we've added "except as otherwise provided herein." That phrase was included in the proposal submitted by the Constitution Revision Commission also. Unless you have any other questions.

Lee Moffitt: What is "otherwise provided herein". That might cause a problem.

: That's so you don't have any conflict with the Constitution, right?

(unintelligible)

Mills: Professor Dore? A law professor from Florida State University, which is a very good law school also.

Pat Dore: Thank you, Mr. Chairman. Actually I think I'm here representing myself rather than the law school. And I'll try to stay out of that process. I thank the chairman for inviting me to come over. As some of you may know, I spent some time working with the Florida Constitution Revision Commission and was the staff for the Ethics, Privacy and Elections Committee of that Commission which was responsible for developing the Commission's proposal on the right

to be let alone. The proposal that you have before you looks very much like the proposal recommended by the Revision Commission with one exception, and that is the introduction of the word "unwarranted" before "governmental intrusion." Mr. Moffitt, if I might address your question at the outset, and that is the meaning for the "except as otherwise provided herein" language. That was initially submitted, or instituted, on the Commission floor at the behest of Commissioner Jack Matthews, his concern being that even though we were in a revision process and the whole document was before the Commission, there was a possibility that a revision coming later in time into the Constitution may be viewed as undercutting provisions already in the Constitution. The Commission was particularly concerned about the Sunshine Amendment, and so the language was put in specifically to indicate that there was no intention to undercut the Sunshine Amendment.

* * *

Dore: Assuming two natural persons. The phrase really has historical significance. The right to be let alone as opposed to be left alone which may in 1980 America seem more grammatically correct. The right to be let alone was first coined by Judge Thomas Cooley in his treatise on torts in 1880, and it was then picked up in a very important law review article written by Warren and Brandeis in 1890 which was the foundation for later recognition of the tort of invasion of privacy. So that the right to be let alone goes back and picks up the first formulation by Cooley. As it's stated at that point it would appear that there is an absolute right to be free from all intrusion, governmental as well as private, but the following phrase should be viewed as a limitation on the right

that has been recognized. That is, the right to be let alone and free from unwarranted governmental intrusion. That phrase clearly limits the intrusion to governmental intrusion and in this proposal limits it to unwarranted governmental intrusion. I feel compelled at this point to say that I think there will be some problems created by use of that word for this reason, and I've already discussed this with the chairman and he knows how I felt about the use of unwarranted during revision. My concern is this: There is a relatively well developed, well published history of the evolution of this process through the revision process. And throughout the debate on the use of the word unwarranted or not stemmed around the importance to be attached to the right to be let alone. That is, those persons who felt that the right to be let alone, to be treated as a fundamental right similar to the right of freedom of speech, freedom of religion, freedom of association, argued that to put unwarranted before intrusion would be to suggest that the right was not as important. On the other hand, those persons who wanted unwarranted to be there were not indicating any discomfort with the right to be let alone. Rather their concern was that the way it was stated is that there is a right to be let alone and free from intrusion would mean that government couldn't do anything to an individual without running into this right. So they were suggesting that some limitation ought to be in place. I appreciate what it is that the chairman has in mind in using "unwarranted" but my concern is that a record be made and it start to be made that if your concern is with establishing essentially a signal to the court, how it is that it should balance the right to be let alone against competing govern-

mental interest, then that needs to be done because coming as its coming on the heels of the revision suggests something a little bit different and since I last talked with you, Mr. Chairman, I would add another point, if I might. And that is in the Supreme Court's recent decision in *Byron Harless,* it somehow rewrote the language in Article I, §12, dealing with search and seizure. Article I, §12 speaks of people's right to be free from unreasonable search and seizure. Twice in its *Byron Harless* opinion, the Supreme Court said "unwarranted" search and seizure. They connected it both times to Article I, §12, nonetheless they misquoted it which again gives me a little bit of concern.

Mills: Are there any comments? I think it might be appropriate if we made something of a record on this.

Nergard: (uninteiligible—something about unwarranted)

Mills: Mr. Moffitt, do you want to talk about that or do you want me to talk about that?

Moffitt: Ron just whispered that same kind of question over to me. I feel comfortable in letting the courts balance what needs to be balanced based upon specific fact situations which may develop arising under this particular proposed section to the Constitution. If we take out the word "unwarranted" for example and delete what may be offered as an amendment "except as otherwise provided herein" we are not leaving the flexibility that I think ought to exist in a constitutional document. The courts have traditionally taken language and have interpreted the language to apply to different fact situations and circumstances as they might arise. We can sit here and brainstorm about a million practical examples and probably wouldn't hit

them all. And you need, I think, an abundance of being careful to leave words like "unwarranted" in there to allow the flexibility to deal with the question when it comes up because there are instances such as search and seizure, for example, where I believe that is a warranted governmental intrusion if certain safeguards are met before a search and seizure is completed. If we take that out, I'm concerned about what kind of monster we might be creating.

Dore: May I offer an observation, Mr. Moffitt?

Mills: Let me inject an observation so you can observe both of them. In my understanding of what we were doing when we put in "unwarranted" we are promoting a balancing test to say that there are some governmental intrusions that are not unconstitutional. That's all. And that the word "unwarranted" is a word through which the court will define which of those intrusions are not constitutional. If I recall in the Constitution revision process, the word "unwarranted" was offered by Governor Collins as an amendment and it failed in subcommittee like 4-2 or something.

Dore: That's not entirely fair. It failed at least 6 times during the process. Governor Collins was very . . .

Mills: It failed at least six times during the process. But I believe his concern was the same as we are expressing and not that we are trying to say the right is less fundamental or less important. At least I think that I wanted to express that.

Dore: If I might, first of all, Mr. Moffitt, I think the closest analogy to what we are talking about is the right to be let alone and free from government intrusion. Unmodified it's found in the First Amendment of the United States Constitution and a similar provi-

sion in Article I, §4 of the Florida Constitution. The First Amendment is Congress shall make no law abridging the freedom of speech or press. It is stated in the most absolute terms that, I think, the drafters or even modern people would know how to state it and yet it has never been construed as meaning what it says. The court has always recognized that there are no constitutional absolutes. That has similarly been the case with the Florida Supreme Court's construction of Article I, §4 which says every person may speak, write and publish his sentiments on all subjects. The courts have always recognized that there must be a balancing of private rights and government responsibilities. The question when you come into balancing, however, is what weight is to be attached to the right, and at least with respect to the First Amendment, it has been referred to as the preferred amendment, not only because of its position, Mr. Moffitt, but also because of the terms in which it is stated. It has, therefore, been understood as the most important, most fundamental, most basic of our rights and government in all instances must meet a higher burden in order to justify infringement of that right. I would suggest to you that that is precisely what the Revision Commission was trying to do with the right to be let alone and that by putting "unwarranted" in, you suggest, number one, the right is not as important; number two, I don't think, Mr. Mills, that you add anything necessarily to the balancing test. There will be balancing. There will be balancing. By saying "unwarranted government intrusion" if I might quote from former Commissioner Dexter Douglass, he says that's a weasel word. What you're doing is giving the court an opportunity to not necessarily be as explicit as they might want to be in terms of the analysis.

Mills: Well, I have two amendments here, from Representative Richmond which raises these issues. So I guess we might as well go ahead and consider those and find out the sentiment of the subcommittee. The first one was on page one, line 16: strike "except as otherwise provided herein."

Richmond: Well, I would just like to go ahead and offer this to have a showdown between the right of privacy and what's called a misnomer as you might say, the Sunshine Amendment because I'll admit the Sunshine Amendment does provide three great things. It gives my secretaries more work; provides for more warehouse space in Tallahassee; and cheap gossip for the newspapers. But other than that, I bet you Dot Glisson out there can tell you not 100 requests from throughout the entire state have been made for our financial disclosure statements. And I think it's just a useless amendment and I'd just like to, let's go ahead rather than clutter up this potentially good constitutional amendment, let's just get that out of there.

Mills: Other discussion?

Moffitt: I move to lay the amendment on the table.

: Bleeding heart liberal.

Mills: Mr. Moffit moves to lay the amendment on the table. This gives Mr. Richmond . . .

Richmond: Quite very clear cut—it's my annual run on the Sunshine Amendment.

Mills: There's no other argument. All those in favor of the amendment's lay, please signify by saying aye. Aye. Opposed. No. It's laid. Mr. Richmond's next amendment, which looks like it's joined by another amendment, or at least joined in sentiment. On page one, line 15: strike "unwarranted".

Richmond: I feel, and I don't know that she ever really hit the way I feel on it, but I feel the word "unwarranted" leaves the amendment to almost a nothing amendment. I think if you're going to have the right of privacy amendments, it's going to be construed by the Supreme Court and it's going to be balanced as you are trying to get without that word. But I believe if you put "unwarranted" in there that it's going to get the slight end of the balance. And therefore, if you want a true right of privacy amendment, you need to take that word out.

Mills: Mr. Conway.

Conway: Mr. Chairman, I would like to ask if there aren't really times where there is warranted government intrusion.

: Certainly search and seizure is one of those areas and you're going to have that balance and you're not going to change the search and seizure law, Bill, I don't think by virtue of this. And as I say taking out "unwarranted" you're going to have the supreme court balance this amendment along side of the other constitutional provisions that we have. But I think when you put unwarranted in there you have a chance of weakening this amendment, Section 23, to such a degree that I don't think you really end up with much and I think what you really want is a good amendment.

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READING OF THE BILL

Rep. Mills: This creates a constitutional right to privacy or actually gives the right to the people to vote on that. I think an important thing to note on this is a recent Harris Poll which indicates that 65% of the people polled believe the right of privacy should be a fundamental right just as life, liberty and the pursuit of happiness. I don't think there's any amendments on this and I think this gives us an opportunity to put our money where our mouth is and say that big government (he's interrupted here).

Rep. Healey: Is this similar to or identical to the constitutional revision amendment which was offered back in November of 1978?

Rep. Mills: It is somewhat different to the extent that it has a provision in there which says unless otherwise provided herein which protects the search and seizure provisions and has a provision dealing with records and open meetings to protect us.

BILL CARRIED OVER TO THIRD READING. It is was read for the third time on 5/6/80 and passed 98 Yeas and 4 Nays.

SJR 935

SENATE RULES COMMITTEE - 5/6/80

Sen. Gordon: I need to offer some amendments to get this whole thing in front of us. It's a simple constitutional amendment which was suggested debate in the Constitutional Revision Commission, I'm sure that some of those members who are here will be able to add to this discussion. But it simply adds a declaration of right, the right of privacy in the state constitution saying that every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein and after the word "herein" we want to insert "this section shall not be construed to limit the public's right of access to public records in meetings as provided by law". Since that...

Sen. Barron: To the amendment on Page 1, line 17 following the language of the bill that the Senator just read add "this section shall not be construed to limit the public's right to access to public records in meetings as provided by law." Discussion on the amendment. Anyone desire to oppose it. . . anyone desire to speak.

Sen. Dunn: We seem to be going so fast her [sic], I want to ask a question. You know, this thing seems in its plain language to be a very absolute statement of constitutional law. Now, I think at least we ought to ask the sponsor of the proposal what his view is with re-

gard to the absolute construction. That says every natural person has a right to be let alone and *free* from governmental intrusions except as provided by the constitution. You know you can read that and not saying I will not ultimately support something personally. If you can read that to say unless it is specifically authorized in the constitution such as the unreasonable search and seizure. All searches and seizures are not prohibited only unreasonable ones are. So, a right to privacy is really a right that is protected by that same constitutional restriction but that is not anywhere near as absolute as this is. Whereas we may be saying that *no* searches and seizures are constitutionally permitted because they would constitute an intrusion into the private life of a person.

Sen. Barron: Senator, we are on the amendment, and maybe you want to discuss them both together.

Sen. Gordon: Senator, my purpose in offering it now and ask that you pass it is so that the amendment would not be. . . I mean we'd get that exception understood. Then I'll be glad to discuss. . .

Sen. Dunn: I have no objection to the amendment.

Sen. Barron: Let's adopt the amendment and then we'll get on to the resolution and we have Pat Dore here who is an expert.

Sen. Gordon: Yes, I would like to have a constitutional expert respond to Senator Dunn's questions.

Sen. Barron: Pat Dore has been cited for the unauthorized practice of law in the State of Florida, been before the Ethics Commission, along with me, we know what it's all about, she is an authority on the constitution.

Pat Dore: Well, Senator, I am not a member of the Florida Bar and I'm not holding myself out as a member of the Florida Bar today. Senator Dunn, with respect to your question, that was an issue that was debated at great length and I will note at this point that without the amendment, the language is precisely the language that was approved by the Constitutional Revision Commission and so we have the background and that history developed. During the course of the debate during the Revision, the primary question was how important a right was the right to be let alone. Was it a right that was considered of fundamental importance as the right of free speech and freedom of religion and free press. Or is it a right of less importance. The commission took the position that the right way to signal, send that figment to the courts, was to put the provision, to put the language in essentially absolute terms recognizing and understanding that there are no constitutional absolutes. The idea was understanding that the courts will engage in a balancing process weighing the competing governmental interests against the intrusion on an individual's privacy. The importance of stating the right in absolute terms was that when

the court put the right in the balance, that it would lean as a weighty fundamental important right which has the effect of increasing the burden of the government in justifying any intrusion.

Sen. Dunn: Could you tell us whether there are any other states which have language identical or substantially identical to the language which is here in this proposal.

Pat Dore: Senator, there are three states now that have so-called free standing rights of privacy, that is a right of privacy that is not connected with another provision in the constitution. Most of them have a provision in the search and seizure section and that has caused all kinds of problems because in two respects: One, that it has suggested that the usual formulation justifying search and seizure was on the people protected from unreasonable search and seizure. Putting a privacy provision in there has suggested that anything that the privacy provision protects a citizen from unreasonable search and seizure. Putting a privacy provision in there has suggested that anything that the privacy provision protects a citizen from unreasonable search and seizure. On one hand, on the other hand, there have been courts that have used that privacy provision to require a higher demonstration to protect the search and seizure area. The three states that have independent or free-standing rights do not have language the same as ours. Ours is differ-

ent and it was carefully chosen to reflect a number of interests and though it has been referred to as the right to privacy, the word privacy no where appears. It's the right to be let alone and there is some historical significance to that phraseology, number one, and number two: It was thought by the Revision Commission that if language not similar to the federal language were used, that the Florida Supreme Court would be more inclined to give this provision an independent and state-based determination.

Sen. Dunn: The language that has been used - right to be let alone and free from governmental intrusion - those will be words of constitutional art and by your use in them I assume that you ascribe some meaning to them or you, or those who have written them. Now what specific governmental activity would this prescription relate to, in other words, right to be let alone in what context and free from what governmental intrusion into what?

Pat Dore: Well, Senator, we have not attempted to define and no writer that I have read has attempted to define precisely what it does mean. However, look at it in its full context. In the first place, the right attaches to natural person. That was done deliberately so that we were talking about is protecting a fundamental aspect of human liberty. The right to be let alone, as I indicated, has historical significance, it was used first in 1880 by Judge Coolidge when

he has writing his Treatise on Torts and was followed up ten years later in the famous Brandeiss letter/review article in Harvard that was credited for laying the predicate for the recognition of the right to invasion of privacy tort. Since that time, the language has appeared in the U.S. Supreme Court Opinion whenever the court was talking about an aspect of human liberty, for example, Justice Brandeiss referred to the right to be let alone in his famous Olmstead dissent by saying that it is the most comprehensive of rights and the right most valued by civilized men. I suspect that Justice Brandeiss, along with you and along with me and everyone in this room has a sense of what his or her privacy is and what it means to them. This provision attempts to elevate, to protect, that principle, within some limitations. The first limitation is that it is only government intrusion into one's private life. That phrase is a limit and suggests that there's not a complete immunity from government interference or government regulation. Rather, there has to be that there is some zone of privacy in something . . . a private life that we all have. Before the right could attach, it would seem that there would have to be some reasonable expectation of privacy before the right would attach and anything that is knowingly or publicly done would not be considered an intrusion into one's private life.

Sen. Dunn: One further question and I won't monopolize your presentation. Do you know of any statute that is on the books now, that would be or arguably, would be invalidated by the adoption of this language?

Pat Dore: No, I don't, Senator, but I don't hold myself out as having a full command of everything in the Florida Statutes. I don't think so. Although, I am a little fearful because of my knowledge. A couple weeks ago, the Senate President made some statement about his great concern about the disclosure of certain information that was being collected by the Secretary of State's office. I don't know whether that is authorized by statute, I guess it maybe is authorized by statute otherwise they couldn't be doing it. And I share, this amendment would provide some opportunity for a person to challenge disclosure of private information.

There is a question here by Sen. Thomas which is not audible which refers to language in the staff analysis.

Pat Dore: No, Senator, what that language, that jargon, fits into is this balancing process that I was referring to earlier. That is before a government intrusion into one's private life could be sustained in the face of a concept with this right, the government interest would have to be very substantial, would have to be compelling and the means that the government selects in order to achieve that end would have to be necessary, the correlation would have to be very direct.

The staff summary suggests that this standard of review ought to be put into the language and I would suggest to you, Senator Thomas, that we had a lengthy debate on this question in Constitutional revision. It was rejected for this reason: that, first of all, the suggestion, if you attach it to this right, and it's no where else attached to any right in the Declaration of what's in the Florida Constitution now, that it raised the question that what is the standard to be used with respect to those. The practical matter the Florida Supreme Court now does use, the so-called compelling need upon, well that just

* * *

is the fundamental quality so that I would reject the suggestion because it may create confusion and in any event, by stating the right in absolute terms, we expect the same result from the judiciary.

Sen. Barron: Senator Myers, you look pensive.

Sen. Myers: Well, since the Supreme Court and all of their rights of privacy cases has used that term compelling state interest, I see no reason why we shouldn't put it in. So it would read: "Every natural person has a right to be let alone and free from governmental intrusion into his private life except as necessitated by a compelling state interest" and then when you had any particular statute that there had to balance the question of right of privacy against the state interest, you would have to spell it out in the statute

as to what the compelling state need was with the statute and I think that's a healthy way to approach individual items along the way. I don't see any reason why you couldn't have that language in there.

Pat Dore: Senator, I would just suggest to you, the problem that that causes for the other provisions in the Declaration of Rights, that you don't have . . . there are actually two objections to using that language, in fact, was in the first bill that the Revision Commission considered.

Sen. Myers: The other Declaration of rights are more or less absolute or at least they have been argues [sic] to be so, but the right of privacy has never been argued to be an absolute right. It's always been a balancing act between government on the one hand, and the rights of individuals on the other.

Pat Dore: That's correct, sir, but that's correct with respect to every constitutional right. I know of no absolute constitutional rights—even the first amendment which is stated in the most absolute terms that we can come up with in the English language, "Congress shall make no law" has not been construed that way. The compelling state interest standard is a standard that the court uses to determine whether the act is an infringement of one's free speech or the right of free press.

Sen. Myers: Well, Justice Douglas would have disagreed with you.

Pat Dore: Oh, yes sir, Justice Douglas and Justice Black, but they are the only two absolutists in our history and those two have never commanded a majority.

Sen. Barron: Alright, Senators, we have time restraints relative to the Committee on Commerce meeting and we want to hear single-member districts. Senator...

* * *

Sen. Gordon: Mr. Chairman, you remember the Constitutional Revision Commission, what was your position when this came up?

Sen. Barron: I voted for it then and I'll vote for it now.

Sen. Gordon: Move the bill.

Sen. Myers: Well, you don't want to put anything in about compelling state need?

Sen. Gordon: I listened. . . I didn't think that your argument was sufficiently compelling, Senator. I really . . . if you think about the first amendment cases, you thank [sic] about the separation cases, if the court is going to take into account the compelling state interests when constitutional rights conflict, then why do you have to single this one out, since it's going to be there anyway, I gather and it would tend to put this right in a different category then the others, which is something that we don't want to do.

Sen. Barron: Senator, couldn't ya'll discuss this back in Dade County, because the President's waiting. Call the roll.

SJR 935 REPORTED FAVORABLY OUT OF RULES COMMITTEE.

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No. 83-1834

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARY ANNE ROBERTSON,
Petitioner,

v.

FLORIDA BOARD OF BAR EXAMINERS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

May the Florida Board of Bar Examiners require applicants for admission to the Florida Bar to disclose "regular treatment for amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder."

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BRIEF FOR RESPONDENT IN OPPOSITION

RULES INVOLVED

Article I, Section 1 of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar provides, in pertinent part:

> The admission of attorneys to the practice of the profession of law is a judicial function.

Article I, section 3 of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar provides, in pertinent part:

> a. Qualifications. Attorney members shall be practicing attorneys with scholarly attainments and

an affirmative interest in legal education and requirements for admission to the Bar. Lay members shall have an academic Bachelor's Degree. It is desirable that lay members possess educational or work-related experience of value to the Board such as educational testing, accounting, statistical analysis, medical or psychologically related sciences.

d. Essential Conduct. A bar examiner should be conscientious, studious, thorough and diligent in learning the methods, problems and progress of legal education, in preparing bar examinations, and in seeking to improve the examination, its administration and requirements for admission to the Bar. Each examiner should be just and impartial in recommending the admission of applicants and should exhibit courage, judgment and moral stamina in refusing to recommend applicants who lack adequate general and professional preparation or who lack good moral character.

Article I, Section 14 of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar provides, in pertinent part:

> All information maintained by the Board in the discharge of those responsibilities delegated to it by the Supreme Court of Florida shall be confidential except as provided by these Rules or otherwise authorized by the Court. All matters including, but not limited to, registrant and applicant files, investigative reports, examination material, and inter-office memoranda shall be the property of the Supreme Court of Florida and the Board shall serve as the custodian of all such records.

Article II, Section 1 of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar provides:

> Every person intending to apply for admission to The Florida Bar shall, within one hundred fifty (150) days following the commencement of the study of law in an accredited law school, register with the

> Board by filing an Applicant's Questionnaire and Affidavit (Form 1) as a registrant upon the forms supplied by the Board, including the documents and papers specified in Article IV, Section 4 except for the filing of the Certificate of Dean as specified in Article IV, Section 4b.(1); a fee of $50.00 as specified in the provision of Article V, Section 5; and such other papers as may from time to time be reasonably required by the Board. The Board will consider as timely filed any registration postmarked or received one hundred fifty (150) days following the commencement of the study of law.

Article III, Section 3(a) of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar provides, in pertinent part:

> Prior to recommending an applicant for admission to practice the profession of law in Florida, the Florida Board of Bar Examiners shall conduct an investigation and otherwise inquire into and determine the character, fitness, and general qualifications of every applicant.

STATEMENT OF THE CASE

The Florida Board of Bar Examiners (hereinafter the "Board") accepts the Petitioner's Statement of the Case and would add the following material facts:

The admission of attorneys to the practice of law in Florida is a judicial function belonging exclusively to the Florida Supreme Court.[1] The Board is charged by the Supreme Court with the authority and responsibility of determining the character and fitness of applicants to the Florida Bar.[2] By this delegation, the Board has been appointed the fact-finder to determine whether an applicant

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[1] Art. V, § 15, Fla. Const. (*See* Petition at page 3); Fla. Sup. Ct. Bar Admiss. Rule, art. I, § 1.

[2] Fla. Sup. Ct. Bar Admiss. Rule, art. III, § 3(a).

to the Bar possesses the requisite education, character, and fitness for the practice of law.

In order to expedite its investigations and insure timely admissions, the Board requests every law student seeking admission to the Florida Bar to complete an Applicant's Questionnaire and Affidavit within one hundred fifty (150) days following commencement of the study of law in an accredited law school.[3] Among the areas of inquiry are previous employment, criminal arrests and convictions, educational background and credit status. If information is revealed which suggests the need for further inquiry, the Board, through its staff, conducts an appropriate investigation.

In order to thoroughly conduct its investigation and properly make its determination, the Board *necessarily* asks questions which are of a personal nature and which would perhaps not be asked of persons not applying for a position of such trust and responsibility. Among the personal matters into which inquiry is made is the past history of regular treatment (currently defined as more than four consultations within a twelve month period) for emotional disturbance or nervous or mental disorder requested in Item 28(b) of the Applicant's Questionnaire and Affidavit.

Petitioner Mary Anne Robertson entered law school in August, 1978, and in accordance with Article II of the Florida Supreme Court Rules Relating to Admissions submitted her Applicant's Questionnaire and Affidavit which was received by the Board on January 16, 1979. Initially, Petitioner responded to all the questions in the Questionnaire save one, Item 28(b). After receiving Petitioner's Questionnaire, the Board advised Petitioner the processing of her application could not begin until her Questionnaire was completed. (App. to Petition at page 21). The Board assured Petitioner, however, that all responses to the Questionnaire "are kept strictly confi-

[3] Fla. Sup. Ct. Bar Admiss. Rule, art. II, § 1.

dential and are viewed only by those connected with the admission process in Florida." *Id.*

Rather than respond to Item 28(b), Petitioner petitioned the Florida Supreme Court on April 27, 1981, for a review of the Board's decision to withhold processing of her application.[4] Subsequently, as Petitioner herself admits, Petitioner filed an Amendment to her application responding to Item 28(b) which was received on June 1, 1981, several weeks prior to her graduation from law school in July, 1981. Petitioner's application was then processed and she was admitted to the Florida Bar on November 20, 1981.

On November 10, 1983, the Florida Supreme Court denied Petitioner's petition for review, citing its November 3, 1983 decision in *Florida Board of Bar Examiners Re: Applicant*, 443 So.2d 71 (Fla. 1983). In *Board of Bar Examiners I*, the Supreme Court of Florida expressly rejected both the statutory and constitutional claims being advanced by Petitioner. In particular, while not expressly deciding whether or which federal privacy rights may be implicated by Item 28(b),[5] the Florida Supreme Court

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[4] In her brief to the Florida Supreme Court, Petitioner objected to Item 28(b) on the grounds it violated Florida's psychotherapist-patient privilege, Section 90.503, Florida Statutes, and her Florida and federal privacy rights.

[5] In *Board of Bar Examiners I*, the Florida Supreme Court found it unnecessary to decide which federal constitutional privacy rights were implicated by Item 28(b) because the Florida court found Item 28(b) constitutional under this Court's highest standard of review, the compelling state interest test, while examining the applicant's rights under Article I, Section 23 of the Florida Constitution. 443 So.2d at 76. However, the Florida Supreme Court expressly noted that if it were to find an applicant's decision-making or autonomy zone of privacy rights affected by Item 28(b), the decisions of this Court would require it to apply the compelling state interest test. *Id.* Additionally, the Florida Supreme Court further noted that if it were to find Item 28(b) affected the privacy rights described by this Court in *Whalen v. Roe*, 429 U.S. 589 (1976), and *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), it should employ a balancing test. *Id.*

found the Board to have demonstrated "a compelling state interest and use of the least intrusive means" sufficient to uphold Item 28(b) under the highest standard of review. 443 So.2d at 76. On February 9, 1984, the Florida Supreme Court denied Petitioner's petition for rehearing and Petitioner sought a Writ of Ceriorari from this Court on May 9, 1984.

SUMMARY OF ARGUMENT

In her Petition, Petitioner seeks review of a Florida Supreme Court decision holding Item 28(b) does not violate a bar applicant's right to privacy. However, since initiating her suit, Petitioner has voluntarily completed Item 28(b) and has been admitted to the Florida Bar. Having brought suit individually and not on behalf of a class, Petitioner's admission to the Florida Bar has rendered her case moot.

Moreover, even if this Court were to decide this case is not moot, the Petition for a Writ of Certiorari should be denied because the Florida Supreme Court has not decided an important question of federal law which has not been settled by this Court, nor has it decided a federal question in a way that conflicts with the applicable decisions of this Court.

REASONS FOR DENYING THE WRIT

I. PETITIONER'S VOLUNTARY RESPONSE TO ITEM 28(b) AND SUBSEQUENT ADMISSION TO THE FLORIDA BAR RENDERS THIS CASE MOOT.

In her Petition for a Writ of Certiorari, Petitioner states that in May, 1981, she filed an Amendment to her Application answering Item 28(b).[6] Six months

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[6] In her Petition for a Writ of Certiorari, Petitioner states she responded to Item 28(b) on May 29, 1981. However, Petitioner's Amendment to her application answering Item 28(b) is dated May 20, 1981, and was received by the Board on June 1, 1981.

later, the Board completed its investigation of Petitioner and she was admitted to the Bar.[7] Petitioner's voluntary amendment of her application and subsequent admission to the Florida Bar has clearly mooted her constitutional claims.

This Court has repeatedly stated that federal court jurisdiction " 'depends upon the existence of a case or controversy' " and that " 'federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.' " *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974), quoting *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964), and *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). This requirement of an actual controversy must be fulfilled at all times, not simply on the date of the action is commenced. *Roe v. Wade*, 410 U.S. 113, 125 (1973). In the instant case, there remains no live controversy between Petitioner and Respondent: Petitioner has completed the application process and has been admitted to the Florida Bar. Moreover, having been admitted to the Bar, there is little likelihood she will ever be required to repeat the application process.[8]

In this regard, the fact of this case resemble those in *DeFunis v. Odegaard*, 416 U.S. 312 (1974). In *DeFunis*, a plaintiff who challenged the admission policies of the University of Washington Law School was allowed to attend law school pending his appeal. When this Court heard argument on the case, DeFunis had entered his final quarter and was assured of graduating regardless of the Court's ruling. As the Court's ruling would have

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[7] Petitioner was admitted to the Florida Bar on November 20, 1981. As noted by Petitioner, the Board normally requires six to eight months to conclude its character investigation. Petitioner's Petition for a Writ of Certiorari at 11.

[8] Petitioner could only be called upon to repeat the application process were she to be disbarred and subsequently seek readmission to the Florida Bar.

no effect upon DeFunis, the case was dismissed as moot. Similarly, the ruling sought by Petitioner today can have no effect upon her as she has completed the application process and has been admitted to the Florida Bar.

Moreover, it cannot be argued this case presents a question that is "capable of repetition, yet evading review," *Roe v. Wade*, 410 U.S. 113, 125 (1973), and is thus amenable to adjudication by this Court. In order for this case to be reviewable under that doctrine, there must be a reasonable expectation the Petitioner herself will be subject to the disputed action again. *DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974) ("But DeFunis will never again be required to run the gantlet of the Law School's admission process, and so the question is certainly not 'capable of repetition' as far as he is concerned."); *Gomes v. Rhode Island Interscholastic League*, 604 F.2d 733 (1st Cir. 1979) ("But our focus must be one whether the question will recur not as to other high school students but as to Gomes, a high school senior, who sued only on behalf of himself and not as a class representative.") As Petitioner will never again be required to answer Item 28(b), this condition is clearly not satisfied in this case. *Nestler v. Board of Law Examiners of State of N.C.*, 611 F.2d 1380, 1382 (4th Cir. 1980) (plaintiffs' admission to bar mooted challenge to state admission's policies "since plaintiffs will never again be required to take the North Carolina bar examination or the moral character interview").

Petitioner brought this action individually and not on behalf of a class. As she retains no interest in the issue she seeks to bring before the Court, this Court should reject Petitioner's request for certiorari on the grounds the case is moot. *Indianapolis School Comm'rs v. Jacobs*, 420 U.S. 128 (1975); *Sosna v. Iowa*, 419 U.S. 393, 399-401 (1975).

II. THE FLORIDA SUPREME COURT HAS NOT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN SETTLED BY THIS COURT, NOR HAS IT DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

Only one federal issue has been raised by Petitioner—whether Item 28(b) violates a bar applicant's constitutional right of privacy. Because that issue presents an insubstantial federal question, Petitioner's request for a Writ of Certiorari should be denied. Rule 17.1(c), Rules of the U.S. Supreme Court. Alternatively, because the decision of the Florida Supreme Court is in harmony with the applicable decisions of this Court, the Petition for a Writ of Certiorari should be denied. *Id.*

Petitioner alleges Item 28(b) violates her right to privacy as guaranteed by the U.S. Constitution. Petitioner argues this Court has recognized three different strands of the constitutional right to privacy, all of which are implicated by Item 28(b). In fact, none of the cases cited by Petitioner support her constitutional claim.

Citing *Katz v. United States*, 389 U.S. 347 (1967), and *Olmstead v. United States*, 277 U.S. 438 (1928), Petitioner first argues Item 28(b) violates her right "to be free in her private affairs from governmental surveillance and intrusion." Petitioner's Petition for a Writ of Certiorari at 19. However, both *Katz* and *Olmstead* dealt with the Fourth Amendment's prohibition against unreasonable search and seizure. Any contention what the information called for in Item 28(b) constitutes an unreasonable "search" can only be described as frivolous.

Second, Petitioner argues Item 28(b) impinges on her disclosural privacy right. *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); *Whalen v. Roe*, 429 U.S. 589 (1977). However, both *Whalen* and *Nixon* upheld the required disclosures. In *Whalen*, the Court ruled

the right of an individual to control access to his or her medical history must yield to the State's interest where public health or other public concerns necessitate disclosure. *Whalen* at 602. Likewise, in *Nixon* the Court found Mr. Nixon's right to privacy outweighed by the public's interest in the archival papers. *Nixon* at 465.

Similarly, the public's interest in the mental and emotional fitness of those persons seeking admission to the practice of law clearly outweighs any privacy rights of the Petitioner. This Court has repeatedly held "a State has a constitutionally permissible and substantial interest in determining whether an applicant possesses 'the character and general fitness requisite for an attorney and counselor-at-law.'" *In re Griffiths*, 413 U.S. 717, 722-23 (1973), quoting *Law Students Research Council v. Wadmond*, 401 U.S. 154, 159 (1971).

The limited disclosure[9] called for in Item 28(b) is certainly no greater than that under consideration in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) (record-keeping requirements for abortions), in *Whalen* (record-keeping requirements for controlled substances), and in *Nixon* ("extremely private communications between him [Nixon] and, among others, his wife, his daughters, his physician, lawyer and clergyman, and his close friends as well as personal diary dictabelts and his wife's personal files." 433 U.S. at 459.).

Indeed, Petitioner's privacy claim more closely resembles that raised in *Law Students Research Council v.*

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[9] Petitioner unconvincingly argues Item 28(b) requires an applicant to disclose facts without sufficient guarantees the information will remain confidential. However, Article I, Section 14 of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar expressly provides guidelines insuring the confidentiality of all information maintained by the Board. Additionally, Article I, Sections 3a and d of the same Rules further establishes high standards for the qualifications and conduct of Board members.

Wadmond, 401 U.S. 154 (1971). In *Wadmond*, the appellants contended certain character and fitness requirements for admission to the New York Bar violated an applicant's right to privacy. However, this Court rejected this claim outright, stating it bordered "on the frivolous." 401 U.S. at 160.

Finally, Petitioner asserts Item 28(b) impinges on her right to decisional autonomy. However, this branch of the right to privacy has been strictly limited to matters relating to marriage, *Loving v. Virginia*, 388 U.S. at (1967), procreation, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), contraceptives, *Eisenstad v. Baird*, 405 U.S. 438 (1972), family realtionships, *Prince v. Massachusetts*, 321 U.S. 158 (1944), and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). As in *Paul v. Davis*, 424 U.S. 693, 713 (1976), Petitioner's claim "is far afield from this line of decisions."

Nonetheless, Petitioner argues the required disclosure is constitutionally infirm because it may result in a potential applicant either choosing to forego needed counseling because of the disclosure requirement or choosing to forego the practice of law in Florida rather than disclose past consultations. In *Whalen v. Roe*, 429 U.S. 589 (1977), the appellees similarly argued a New York statute which required the disclosure of the use of certain drugs violated their right of privacy because the disclosure might make some patients reluctant to use, and some doctors reluctant to prescribe, such drugs even when their use was medically required. *Id.* at 600. While acknowledging the New York statute may have such an effect, this Court nonetheless upheld the statute over the privacy objections. *Id.* at 602-04.

As is seen above, there is no support for any of the privacy arguments made by Petitioner. Moreover, in *Board of Bar Examiners I* the Florida Supreme Court acknowledged and properly applied the applicable right to privacy decisions of this Court. Accordingly, the Petition

for a Writ of Certiorari should be denied because the Florida Supreme Court has not decided an important question of federal law which has not been settled by this Court. Rule 17.1(c). Alternatively, the Petition for a Writ of Certiorari should be denied because the Florida Supreme Court has not decided a federal question in a way that conflicts with the applicable decisions of this Court. *Id.*

CONCLUSION

Petitioner's admission to the Florida Bar has clearly mooted her constitutional claims. Moreover, the Florida Supreme Court's finding that the Board demonstrated a compelling state interest and the use of the least intrusive means is in accordance with the applicable decisions of this Court. Accordingly, the Petition for a Writ of Certiorari to the Florida Supreme Court should be denied.

Respectfully submitted,

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No. 83-1834

In the Supreme Court of the United States

October Term, 1983

MARY ANNE ROBERTSON,
Petitioner,

vs.

FLORIDA BOARD OF BAR EXAMINERS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF PETITIONER

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INTRODUCTORY STATEMENT

In her Petition for Writ of Certiorari to the Supreme Court of Florida, Mary Anne Robertson ("Robertson") argued that Item 28(b) on the application for admission to the Florida Bar constitutes an improper invasion of her federally-guaranteed right to privacy. Item 28(b) requires Florida Bar applicants to disclose all past "regular treatments"[1] for any "emotional disturbance" no matter how private and unrelated they may be to the applicant's fitness to be a lawyer or her *present* mental condition. No compelling state interest justifies so unnecessarily broad-ranging and intrusive an inquiry into the most intimate aspects of an applicant's private life. In fact, a comparison of Florida's policy with that of other states reveals that Florida employs the method *most* gratuitously intrusive of the privacy rights of bar applicants to investigate character and fitness. The Florida Board of Bar Examiners (the "Board") simply sidesteps this core issue in its Brief of Respondent in Opposition ("Opp. Br."); the Board thus never addresses the question actually raised by Robertson —why the overbroad Item 28(b) is necessary to secure the Board's interest in accurately assessing the character and fitness of bar applicants (Opp. Br. at 3-4).

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1. At the time Robertson submitted her application to the Florida Bar, "regular treatment" was defined as *two* or more consultations in any twelve-month period. The term has since been redefined as *four* or more consultations in the same time period.

ARGUMENT

The Board makes two arguments for denying the writ of certiorari sought: (i) Robertson's "voluntary" response to Item 28(b) renders the case moot (Opp. Br. at 6-8) and (ii) the Florida Supreme Court did not decide a substantial federal question, or, in the alternative, did so in harmony with applicable decisions of this Court (Opp. Br. at 9-12). Neither of these arguments was made or adopted by the Florida Supreme Court in its decision. As will be shown below, both arguments lack any merit.

I. THIS CASE IS NOT MOOT

The Board contends that Robertson's "voluntary amendment of her application [answering Item 28(b)] and subsequent admission to the Florida Bar" render her claim moot (Opp. Br. at 7). The Board suggests that since Robertson herself will never again be called upon to answer Item 28(b), the fact that she did not bring this action on behalf of a class means "she retains no interest in the issue she seeks to bring before the Court" (Opp. Br. at 8). The Board's argument betrays a complete misunderstanding both of the privacy violation of which Robertson complains and of the Board's own application and appeal procedures.

A. The Board's Invasion Of Privacy Is A Continuing Wrong Which Presents An Actual Controversy For This Court's Determination.

Robertson's response to Item 28(b) did not end this controversy. Her release of private information to the Board only *began* the Board's invasion of her privacy. Privacy interests are considered "a continuum which can

be further invaded with each passing day by a single and unchanging encroachment." *United States v. Hubbard,* 650 F.2d 293, 319 n. 99 (D.C. Cir. 1980). So long as the Board retains Robertson's response to Item 28(b) in its files, her privacy right is being infringed. *See McKenna v. Fargo,* 510 F.2d 1179, 1182 (3d Cir. 1975). The possibility always exists that others who have not yet read Robertson's response to Item 28(b) will read it. The Board is not a static entity; its membership—and thus those individuals with access to applicant files—changes regularly. *See, e. g., Walter v. United States,* 447 U.S. 649, 659 n. 13 (1980) ("A partial invasion of privacy cannot automatically justify a total invasion."); *Cell Associates, Inc. v. National Institutes of Health, Department of Health Education and Welfare,* 579 F.2d 1155, 1157 (9th Cir. 1978) (Privacy Act claim not mooted by public disclosure of materials and widespread comment by press).

The Board stresses that Article I, Section 14 of the Rules of the Supreme Court of Florida Relating to Admission to the Bar "provides guidelines insuring the confidentiality of all information maintained by the Board" (Opp. Br. at 10 n. 9). However, the Board does *not* reveal to this Court that at the time it filed its brief in this case, it was seeking, in the Florida Supreme Court, to *change the rules regarding the confidentiality of applicant files.* The Board sought to make an applicant's file "a public record in the Supreme Court of Florida" whenever an applicant petitioned the Florida Supreme Court "to obtain a review of the Board's recommendation regarding character and fitness." Subsequent to the Board's filing of its brief in this case, the Florida Supreme Court declined to adopt the proposed rule change. *See Florida Board of Bar Examiners: Re: Amendment to Rules Relating to Admission to the Bar, Article III, Section 4*

(*Character and Fitness*), ... So.2d ....., 9 Fla.L.Wkly. 225 (Fla. 1984). The Board's effort to change its rules nonetheless underscores the fact that the threat to Robertson's privacy is very much alive.[2]

B. The Board Cannot Employ Its Own Procedures Against Robertson In Order To Render Her Claim Moot.

The Board claims that Robertson's case is moot because she "voluntarily" answered Item 28(b). Even were the invasion of Robertson's privacy not an ongoing violation of her rights constituting a live controversy, the Board would be wrong. Having, in effect, forced Robertson to "voluntarily" respond to Item 28(b), the Board is precluded from arguing that her case is now moot simply because she responded under pressure.

In its brief before this Court, the Board admits, among other things, (i) that it normally takes six to eight months for the Board to complete a character investigation (Opp. Br. at 7 n. 7) and (ii) that it refused to begin its investigation of Robertson until she answered Item 28(b) (Opp.

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2. None of the cases cited by the Board for the proposition that Robertson's response to Item 28(b) renders her claim moot concerns a claimed invasion of privacy; rather each concerns a discrete wrong beyond the reach of the particular court to remedy. *E.g., DeFunis v. Odegaard*, 416 U.S. 312 (1974) (plaintiff challenging admissions process was graduated from law school); *Nestler v. Board of Law Examiners*, 611 F.2d 1380 (4th Cir. 1980) (plaintiffs challenging bar admission policies on due process grounds admitted to bar); *Gomes v. Rhode Island Interscholastic League*, 604 F.2d 733 (1st Cir. 1979) (plaintiff challenging rule against male participation in high school volleyball competition was graduated from high school).

Here, the Court has a remedy available to satisfy Robertson's claim. The Court can order the private material expunged from Robertson's bar file and declare Item 28(b) unconstitutional because it violates applicants' right to privacy. Robertson requested that remedy. The Florida Supreme Court declined to grant it.

Br. at 4). In no phase of this litigation has the Board ever explained *why* it could not, or would not, begin the investigative process until completion of Item 28(b). The Board simply gave Robertson an ultimatum: she could either answer Item 28(b) and proceed in timely fashion, or refuse to answer and maintain her challenge, thus risking an indefinite delay in the Board's initiation of its time-consuming investigative process and thereby in the start of her legal career. Robertson cannot now be penalized simply because she refused to give up her career for *a period of years* in order to pursue her claim. *See, e.g., Steffel v. Thompson,* 415 U.S. 452, 459 (1974) (petitioner need not "first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights").

The Board further suggests that had Robertson brought her claim on behalf of a class rather than simply as an individual, the fact that *she* answered Item 28(b) would not have rendered the claim moot for the class. But the Board's argument ignores the unique procedural posture of this bar challenge case. This action is not a traditional adversarial proceeding. Robertson did not file suit against the Board. Rather, she petitioned the Florida Supreme Court for review of the Board's determination that she had to answer Item 28(b) pursuant to the procedure established for such review in the Rules of the [Florida] Supreme Court Relating to Admissions to the Bar. Thus, Robertson had no opportunity to bring her challenge as a class suit. If the Board were correct, and Robertson's claim were moot as to her and thus moot in general, petitioners such as Robertson—unable to protect their claims by bringing them as class actions—would always be denied meaningful review. The Board cannot take advantage of its own procedures in this way to deny Robertson her day in court.

II. ROBERTSON'S CLAIM OF INVASION OF PRIVACY RAISES A SUBSTANTIAL FEDERAL QUESTION MERITING THIS COURT'S REVIEW

The Board argues that the issue "whether Item 28(b) violates a bar applicant's constitutional right of privacy . . . presents an unsubstantial federal question" and that Robertson's Petition for Writ of Certiorari should therefore be denied. The decision of the Florida Supreme Court in *Florida Board of Bar Examiners re: Applicant*, 443 So.2d 71 (Fla. 1983) ("Board of Bar Examiners I"), however, indicates quite explicitly that the Board is wrong on this point. The Florida Supreme Court clearly found "that the applicant's right of privacy is implicated by Item 28(b)." *Id.* at 74. The only issue for the court was whether the Board had shown both a compelling state interest and use of the least intrusive means available to preserve that interest. *Id.*

In the alternative, the Board contends that the decision below "is in harmony with the applicable decisions of this Court" and that Robertson's petition should be denied for this reason. Repeatedly the Board asserts that the state interest in ensuring that persons seeking admission to the bar are mentally and emotionally fit is a compelling one. Never, however, does the Board explain how Item 28(b) in any way serves that interest or why an inquiry as broad as Item 28(b) is needed. Instead, the Board claims (i) that the right to be free from governmental intrusion is irrelevant—despite Item 28(b)'s obvious intrusion into the traditionally private relationship of psychotherapist and patient, (ii) that the disclosural privacy right is not infringed because access to the applicant's file is strictly limited—despite the Board's own efforts to make the applicant's file a public record, *see supra*, and (iii)

that the decisional autonomy right is not implicated because matters of family and procreation are not involved —despite the fact that the counseling required to be disclosed by Item 28(b) quite likely deals with precisely such matters.[3] The Board's claim that the federal constitutional right to privacy is neither implicated nor, if implicated, infringed by Item 28(b) is frivolous.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Supreme Court of Florida should be granted.

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3. This case is very different from *Law Students Research Council v. Wadmond*, 401 U.S. 154 (1971), cited and relied upon by the Board. In *Wadmond*, the privacy claim rejected as "frivolous" concerned a question on a third-party affidavit which asked the affiant to state whether he had visited the applicant's home and, if so, how often. Such an inquiry is far removed from the instant case in which the applicant is required to divulge her past history of treatment for "emotional disturbance" and release the medical records—whatever their contents—concerning that treatment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Petitioner was served by first class mail this 19th day of September, 1984, upon the following:

C. Graham Carothers
Post Office Box 391
Washington Square Building
Tallahassee, Florida 32302

PARKER D. THOMSON

FIFTY STATE SURVEY OF BAR APPLICATION QUESTIONS CONCERNING THE MENTAL AND EMOTIONAL FITNESS OF APPLICANTS TO PRACTICE LAW

ALABAMA

12. (a) Have you ever been committed or ever been a voluntary patient in any sanitarium, hospital, or mental institution, or ever been under the care of a physician or psychologist for the treatment of a nervous or mental illness? Yes ☐ No ☐

If YES, attach a statement giving full explanation, including name and address of doctor and institution. Have your doctor forward directly to us a statement as to your problem, the treatment, and his/her prognosis of your condition at the present time.

ALASKA

17. Guardianship or Commitment. Have you ever been under guardianship or declared a ward of any court (other than as a minor), or have you ever been declared incompetent? If yes, please explain:

.....

.....

.....

.....

.....

.....

18. Disability. Have you ever had any disability or undergone treatment for any health problem that may

have a bearing upon your fitness to practice law (e.g., alcoholism or mental illness)? If yes, please explain:

.....

.....

.....

.....

.....

.....

ARIZONA

13. (a) Have you ever been adjudged an incompetent, or a conservatee or protected person, or have any proceedings ever been brought for such purposes, or have you ever been treated or confined for mental or emotional disorders? .....
Yes or No

If your answer is yes, give full details, including but not limited to the name and locality of the court, if any, the date of proceeding, if any, the name and address of the institution, if any, and, if applicable, the name and address of the physician, the inclusive dates you were adjudged either an incompetent or conservatee or protected person, or committed to any institution.

ARKANSAS

(e) Have you ever been adjudicated an incompetent person, an insane person, or a lunatic by any court? ..... (Yes or No)

Give full details for (a), (b), (c), (d), and (e), including dates, the court, if any, reference to the court records,

if any, the facts, the disposition of the matter, and if no court records are available, give to the best of your ability the names and addresses of all persons involved, including counsel.

.....

.....

.....

.....

(f) Are you now suffering or have you ever suffered from or been treated for any mental illness?
..... (Yes or No)

If your answer is yes, give the names and addresses of any doctors who have treated you and the names and addresses of any institutions in which you were hospitalized, either as a patient or an out-patient. Also attach authorization addressed to each of the doctors and the institutions listed authorizing the giving to the Board any information concerning you.

.....

.....

.....

.....

CALIFORNIA

13.1 Have you ever been adjudged an incompetent, or a conservatee, or have any proceedings ever been brought against you for such purposes, or have you ever been committed to any institution? Circle yes or no.

If YES, give full details below:

.....

.....

.....

I hereby authorize all educational institutions, governmental agencies and instrumentalities (including bar associations and bar examiners of other jurisdictions), my references, employers and business and professional associates (past and present), to release to the Committee of Bar Examiners any information, files, or records requested by the Committee in connection with the processing of this application. The foregoing release does not apply to matters communicated by me in confidence to any lawyer, spouse, physician, psychotherapist, sexual assault victim counselor or clergyman as to which I have a privilege of non-disclosure under the provisions of Chapter 4, Division 8 of the California Evidence Code.

COLORADO

27. Have you EVER received a diagnosis of amnesia, emotional disturbance, or nervous or mental disorder? (If YES, on a SEPARATE EXPLANATION PAGE describe all relevant circumstances, including, but not limited to, the names and addresses of the psychologists, psychiatrists or other medical practitioners who made such diagnosis.) ..... YES ..... NO

28. Have you EVER received regular treatment for amnesia, emotional disturbance, or nervous or mental disorder? (If YES, on a SEPARATE

EXPLANATION PAGE describe all relevant circumstances in detail, including, but not limited to, the names and addresses of the psychologists, psychiatrists or other medical practitioners who treated you. You may omit isolated instances of consultation for conditions of emotional stress or short term counseling for marital problems.) ..... YES ..... NO

29. During the last ten years, have you been voluntarily or involuntarily confined in a hospital for treatment of mental, emotional or nervous disorders? (If YES, on a SEPARATE EXPLANATION PAGE describe in detail all relevant circumstances, including, but not limited to, the nature of the disorder, the dates and place of confinement, the names and addresses of the treating medical practitioner, and the prescribed treatment.) ..... YES ..... NO

30. Have you EVER been declared legally incompetent? (If YES, on a SEPARATE EXPLANATION PAGE describe all relevant circumstances, including, but not limited to, the date and court.) ..... YES ..... NO

CONNECTICUT

15. (A) Have you ever been adjudicated an insane or incompetent person? If so, explain.

DELAWARE

28. Have you ever been declared legally incompetent? ..... Yes ..... No If yes, please give full details as to court, date and circumstances.

29. (a) Have you ever received diagnosis of amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder? ..... Yes ..... No If yes, please state the names and addresses of the psychologists, psychiatrists, or other medical practitioners who made such diagnosis.

DISTRICT OF COLUMBIA

(c) Have you ever been adjudicated an insane or incompetent person by any court? .....
(Yes or No)

If yes, give full details.

.....

.....

FLORIDA

(a) Have you ever received diagnosis of amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder? ..... If yes, please state the names and addresses of the psychologists, psychiatrists, or other medical practitioners who made such diagnosis.

(b) Have you ever received REGULAR treatment for amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder? ..... If yes, please state the names and addresses of the psychologists, psychiatrists, or other medical practitioners who treated you. (Regular treatment shall mean consultation with any such person more than two times within any 12 month period.)

I have directed each of the foregoing doctors and hospitals to furnish to the Board any information the Board may request with respect to any such treatment.

GEORGIA

Have you ever been declared legally incompetent? .....
If so, give full details as to court, date and circumstances.

Have you ever received diagnosis of amnesia, emotional disturbance, nervous or mental disorder? ..... If so, state the names and addresses of the psychologists, psychiatrists, or other medical practitioners who made such diagnosis.

Have you ever received regular treatment for amnesia, emotional disturbance, nervous or mental disorder? .....
If so, state the names and complete addresses of the psychologists, psychiatrists or other medical practitioners who treated you. (THIS QUESTION IS NOT INTENDED TO APPLY TO ISOLATED INSTANCES OF CONSULTATION FOR CONDITIONS OF EMOTIONAL STRESS.)

I have directed each of the foregoing doctors and hospitals to furnish to the Board any information the Board may request with respect to any such treatment.

HAWAII

16. Have you ever been judicially declared incompetent? ....
Yes No

If so, state the facts fully.

IDAHO

(c) Have you ever been declared a ward of any court or adjudicated an incompetent person, an insane person or a lunatic by any court, or has any proceeding ever been instituted making any such charge against you? ..... (Yes or No).

ILLINOIS

(f) Have you ever been adjudged incompetent or insane by any court? .....

INDIANA

No question.

IOWA

10. Have you ever been duly adjudicated a mentally incapacitated person or committed to an institution or hospitalized for treatment of mental incapacity? ..... If "yes", give pertinent dates, names and addresses of institutions or hospitals, and doctors.

KANSAS

d. Have you ever been hospitalized or institutionalized for reasons of mental health? ..... (Yes or No)

e. Have you ever been adjudged a mentally incapacitated person or placed under guardianship or conservatorship, or declared a ward of the Court, for reasons other than minority? ..... (Yes or No)

If any of these questions, b-e, or any part thereof, is answered in the affirmative, attach a statement giving details, circumstances, names of doctors who treated you, hospitals in which treatment received, and dates of treatment.)

KENTUCKY

13. Have you ever been judicially declared incompetent?

.....

(yes or no)

If so, state the facts fully.

LOUISIANA

20. Have you ever been hospitalized in either a private or public institution because of any mental condition or disorder? .....

.....

.....

21. If so, state when, where and give the names and addresses of all doctors who treated you. .....

.....

.....

.....

MAINE

7.

(c) Have you ever been adjudged incapable of managing your own affairs for any reason other than minority? YES ☐ NO ☐

If your answer to any of the above subsections is YES, furnish full information including:

.....

Date Court Nature of Proceedings Disposition

.....

.....

11. (a) Have you ever been a patient of a doctor or as an in-patient or an out-patient in any sanitarium, hospital, or mental institution for the treatment of mental illness? YES ☐ NO ☐ If so, please attach a statement, giving a full explanation including the name and address of the doctor and the institution.

MARYLAND

14. (a) Have you within the past ten years ever been a voluntary patient in any sanitarium, hospital or mental institution for the treatment of a mental illness?

.....

Yes or No

If so, attach statement giving full explanation, including name and address of doctor and institution.

I have directed each of the foregoing doctors to furnish directly to the Board any information requested by the Board in respect to any such treatment.

MASSACHUSETTS

18. Have you ever been judicially declared incompetent?

.....

(yes or no)

If so, state the facts fully.

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MICHIGAN

19. Have you ever been:

f. Placed under guardianship or declared a ward of any court (other than as a minor), or have you ever been declared incompetent or committed to or confined in any institution?

MINNESOTA

18. Have you ever been committed or ever been a voluntary patient in any sanitarium, hospital, or mental institution, or ever been under the care of a physician or psychologist for the treatment of a nervous or mental illness? ..... If so, attach statement giving full explanation, including name and address of doctor and institution.
(Yes or No)

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MISSISSIPPI

(13) (a) Within the last 5 years have you been committed or been a voluntary patient in any sanitarium, hopsital, or mental institution for the treatment of an emotional or mental problem, or within the past 5 years been under the care of a phychiatrist or psychologist for the treatment of an emotional or mental problem? ☐ Yes ☐ No If so attach statement giving a brief explanation, including name and address of the doctor and institution.

MISSOURI

HAVE YOU EVER BEEN:
(ANSWER YES OR NO)

25. Under guardianship, declared a ward of a court, or declared incompetent because of mental illness or condition, or committed, confined or treated in any institution for mental illness? .....

MONTANA

15. Have you ever been under guardianship or declared a ward of any court (other than as a minor) or have you ever been declared incompetent or committed to or confined in any mental institution within the past five years?

16. Have you ever had any physical or mental disability or undergone treatment for any health problem having a bearing upon your fitness to practice law within the past five years?

NEBRASKA

6. The following questions are truthfully answered from my own knowledge:

c.

(5) Have you ever been adjudicated an incompetent or insane person by any court? (Yes or No) .....

NEW JERSEY

C. Have you ever been hospitalized or institutionalized for the treatment of emotional, mental or nervous disorders? ..... If yes, give names of treating
Yes or No
physicians, therapists or counsellors, dates and places of in-patient therapy and other details.

NEW MEXICO

17.

(e) Have you ever been adjudicated an incompetent person, an insane person or a lunatic by any court? .....
Yes or No

19. Have you ever been a voluntary patient in any sanitarium, hospital or mental institution for the treatment of a mental illness ..... If so, attach
Yes or No
statement giving full explanation, including name and address of doctor and institution.

NEW YORK

18. State whether you have

(c) since attaining the age of 18, been adjudged an incompetent, or had proceedings brought to have you adjudged an incompetent, or been committed to or been a patient in any institution for the care of persons suffering from mental or nervous disorders or drug addiction, drug abuse or alcoholism ....

If you answer is "Yes" to any subdivision of this question, indicate the subdivision and state the facts as fully as possible, giving in each instance the name and locality of the court or agency, the approximate date of the action or proceeding and the judgment or other disposition.

NEVADA

Have you ever been declared a ward of any court or been adjudicated an incompetent person, a mentally diseased person or an insane person by any Court? ☐ Yes ☐ No
If yes, give full particulars including names, dates, places and courts.

Have you ever been treated privately for a mental illness or disease or been committed to any institutions or been a voluntary patient in any sanitorium, hospital or mental institution for the treatment of a mental disease, drug addiction or alcoholism? ☐ Yes ☐ No If so, give details, including description of disease or illness, dates, names and addresses of doctors and institutions.

NORTH CAROLINA

17. Have you ever received regular treatment for amnesia, of any form of insanity, emotional disturbance, nervous or mental disorder? ..... If so, please state

Yes or No

the names and addresses of the psychologists, psychiatrists, or other medical practitioners who treated you. (This question is not intended to apply to isolated instances of consultation for conditions of emotional stress.)

NORTH DAKOTA

20. Have you ever been treated or confined for mental or emotional disorders, adjudged incompetent or insane by any court or declared a ward of the court? .....

If so, give details.

OHIO

12. State whether you have been, or presently are:

(c) treated for mental illness .....

(d) adjudged incompetent by any court .....

(e) committed to or confined in any mental or correctional institution .....

OKLAHOMA

HEALTH:

8.

d. Have you ever been a patient of a mental institution or other similar hospital or institution? ..... (Yes or No)

e. Have you ever been afflicted with or received treatment for amnesia, or any form of insanity or mental disorder, or suffered from any mental illness? ..... (Yes or No)

f. Have you ever been under guardianship or declared a ward of the Court, other than a minor, or declared incompetent? ..... (Yes or No)

g. Do you give your consent for the doctor who treated you to furnish to the Board of Bar Examiners any information requested by the Board in respect to such treatment ..... (Yes or No)

(If any of these questions, b-f, or any part thereof, is answered in the affirmative, attach a statement giving details, circumstances, names of doctors who treated you, hospitals in which treatment was received, and dates of treatment).

OREGON

16. If your answer to any of the portions of question 16 is "yes," attach a separate sheet of paper to this application, in duplicate, with a full explanation of the circumstances which required that you give an affirmative answer to that portion of the question. Be as complete and detailed as you can. If the information is not sufficiently complete and detailed to give the Board of Bar Examiners a full understanding of the circumstances, your application will not be considered complete until you provide the necessary additional information. If your explanation refers to a court case or administrative proceeding, give the number of the case or proceeding and sufficient information so that the Board of Bar Examiners can locate the record.

(h) Has any proceeding ever been instituted to declare you a ward of court or adjudicated an incompetent person, an insane person or a mentally diseased person? Yes ..... No .....

(l) Have you ever undergone emotional, psychological or psychiatric diagnosis or treatment? Yes ..... No .....

PENNSYLVANIA

11. Have you within the last (3) years:

(a) undergone treatment or been committed to an institution for the treatment of mental illness? ☐ Yes ☐ No

RHODE ISLAND

(e) Have you ever been adjudicated an incompetent person, an insane person or a lunatic by any court?

.....

Yes or No

SOUTH CAROLINA

19.

(c) Have you ever been declared legally incompetent? ....

Yes or No

If so, please give full details as to Court, date, and circumstances. .....

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(d) Have you ever received treatment for amnesia, or any form of insanity, emotional disturbance, or mental disorder? ....

Yes or No

If so, please state the names and addresses of the psychologist, psychiatrist, or other medical practitioner

who treated you and list any medications prescribed or taken in the last twelve months. .....

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SOUTH DAKOTA

(b) Have you ever been declared a ward of any court, or adjudged an incompetent, or a conservatee, or have any proceedings ever been brought for such purposes, or have you ever been committed to any institution? Yes ..... No .....

If your answer is yes, give full details including the name and locality of the court, if any, the date of proceeding, if any, the name and address of the institution, if any, and, if applicable, the inclusive dates you were a ward of the court, or adjudged either an incompetent or conservatee, or committed to any institution. .....

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TENNESSEE

14. Have you ever been judicially declared incompetent?

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(yes or no)

If so, state the facts fully.

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TEXAS

11. Have you, within the last ten years:

(a) Been examined or treated for mental, emotional or nervous disorders? ....

(yes or no)

(b) Been voluntarily or involuntarily committed to a hospital or institution as a result of mental, emotional or nervous disorders? .....

(yes or no)

If you answer either (a) or (b) "YES," give details, including dates of treatment or confinement, where treated and by whom, and your reason for seeking treatment.

.....

.....

UTAH

9. Have you ever been a patient in any sanitarium, hospital or mental institution for the treatment of a mental illness? ..... If so, attach statement giving full explanation, including name and address of doctor and institution.

12.

(f) Have you ever been adjudicated an incompetent person, an insane person or a lunatic by any court? .....

VERMONT

Please answer the following questions. If you answer yes to any question please explain in detail on the lines immediately following the questions.

YES NO

☐ ☐ Have you ever been adjudged to be insane or incompetent person by any court?

VIRGINIA

18. Have you ever been judicially declared incompetent?
.....
(yes or no)

If so, state the facts fully.

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WASHINGTON

K. Have you undergone treatment for any psychiatric problem, or for alcoholism or other drug dependency, during the past 5 years? If yes, give full details on an attached sheet? YES NO

WEST VIRGINIA

"Have you ever been a voluntary patient in any sanitarium, hospital or mental institution for the treatment of a mental illness. ..... If so, attach statement giving full explanation, including name and address of doctor and institution."

WISCONSIN

27. (a) Have you ever been judicially declared incompetent?

..... Yes ..... No

(b) Are you presently the subject of any such proceedings?

..... Yes ..... No

WYOMING

28. Has Petitioner ever been declared a ward of any court, adjudicated an incompetent or insane person, or been addicted to or undergone treatment for the use of narcotics, drugs, or the excessive use of intoxicating liquors. ..... (Answer yes or no).